(28,338)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 383.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH H. CLIFT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1921.

a UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judge of the Supreme Court of the State of Indiana, Greeting:

Because in the record and proceedings, as also on the rendition of the judgment of a plea which is in the said Supreme Court, before you, between Joseph H. Clift and Southern Railway Company, a minifest error hath happened, to the great damage of the said Southern Railway Company as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Joseph McKenna, Associate Justice next in precedence to the Chief Justice of the Supreme Court of the United States, and the seal of said District Court, this 31st day of May, A. D. 1921.

[Seal of the District Court of the United States, District of Indiana.]

NOBLE C. BUTLER,
Clerk of the District Court of the United States
for the District of Indiana.

Allowed.

HOWARD L. TOWNSEND,
Chief Justice of Supreme Court of Indiana.

5/31/21.

Copy of above writ for the defendant in error lodged in the Clerk's Office of the District Court of the United States for the District of Indiana on the — day of ——, 19—.

In obedience to the above writ I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the above entitled cause, this — day of ——, A. D. 19—.

——— ———,
Clerk of the District Court of the United States
for the District of Indiana.

[Endorsed:] No. —. District Court of the United States for the District of Indiana. Southern Railway Company, Plaintiff in Error, vs. Joseph H. Clift, Defendant in Error. Writ of Error to the Supreme Court of the United States. Filed May 31, 1921. Patrick J. Lynch, Clerk.

b Original.

In the Supreme Court of Indiana.

No. 23876.

SOUTHERN RAILWAY COMPANY, Appellant,

vs.

JOSEPH H. CLIFT, Appellee.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of the State of Indiana in rendering judgment against it in the above entitled case, the Southern Railway Company, Appellant, hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

JOHN D. WELMAN,
Attorney for Appellant.

STATE OF INDIANA, ss:

Supreme Court of Indiana.

Let the Writ of Error issue upon the execution of a bond by the Southern Railway Company to Joseph H. Clift in the sum of $500.00; such bond when approved to act as a supersedeas.

Dated May 31st, 1921.

HOWARD L. TOWNSEND,
Chief Justice Supreme Court of Indiana.

c [Endorsed:] Supreme Court of Indiana. No. 23876. Original. Southern Railway Company, Appellant, vs. Joseph H. Clift, Appellee. Petition for Writ of Error. Filed May 31, 1921. Patrick J. Lynch, Clerk. John D. Welman, Attorneys for Appellant, Evansville, Ind.

d Supreme Court of the United States.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

JOSEPH H. CLIFT, Defendant in Error.

Assignment of Errors.

The Plaintiff in Error, the Southern Railway Company, assigns the following errors as having been committed herein:

1. The court erred in failing to hold that the Act of the Legislature of Indiana, being Chapter 183 of the Acts of 1911, approved March 4, 1911, and the same being Sections 3920-*b* to 3920-*h* Burns Revised Statutes of Indiana 1914; was contrary to the Constitution of the United States and particularly in violation of the Fourteenth Amendment to the Constitution of the United States, and Section One of that Amendment.

2. The court erred in holding that under said Statute of the State of Indiana that the Southern Railway Company was justly denied the right to have tried by the court, and a jury if it should demand it, the amount that the shipment of Joseph H. Clift was damaged, if any; and that the claim of Joseph H. Clift for $62.30 having been presented by him in writing for said amount stood admitted as a liability due and payable for that full amount and for the reason that the Southern Railway Company had not rejected said claim within ninety (90) days from the date of presentation and had neither paid nor rejected said claim in whole or in part within said ninety days.

e 3. The court erred in rendering and affirming judgment against the Plaintiff in Error for the full amount of said claim together with interest upon the pleadings in said cause, thereby denying the Plaintiff in Error the right to defend the case upon its merits as to the amount the Defendant in Error was damaged and whether he was damaged at all.

4. The court erred generally in its decision against the Plaintiff in Error.

Wherefore, for these and other manifest errors appearing in the record, the said Southern Railway Company, Plaintiff in Error prays that the judgment of the said Supreme Court of Indiana be reversed and set aside and held for naught, and that judgment be rendered for the Plaintiff in Error granting it its rights under the Constitution of the United States, and plaintiff in error also prays judgment for its costs.

ALEXANDER P. HUMPHREY,
EDWARD P. HUMPHREY,
JOHN D. WELMAN,
LUCIUS C. EMBREE,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed May 31, 1921. Patrick J. Lynch, Clerk.

f UNITED STATES OF AMERICA, ss:

To Joseph H. Clift, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington thirty (30) days after the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of Indiana, wherein the Southern Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the Plaintiff in Error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Howard L. Townsend, Chief Justice of the Supreme Court of Indiana this the 31 day of May, 1921.

[Seal of the Supreme Court of Indiana.]

HOWARD L. TOWNSEND,
Chief Justice of the Supreme Court of Indiana.

Citation accepted for Joseph H. Clift, Defendant in Error, this the 1st day of June, 1921.

JOSEPH H. CLIFT,
By MORTON McDONALD,
Attorney in Fact and Attorney of Record.

g [Endorsed:] Filed Jun- 21, 1921. Patrick J. Lynch, Clerk.

1 STATE OF INDIANA:

In the Supreme Court.

Be it remembered that heretofore to-wit: On the 6th day of December, 1920, the same being the 13th Judicial Day of the November Term, 1920, of said Supreme Court, the Southern Railway Company, by its Attorneys, Lucius C. Embree and Morton C. Embree, filed in the Office of the Clerk of the Supreme Court of said State of Indiana, a transcript of the record and proceedings had in the Gibson Circuit Court of said State of Indiana in a cause wherein the Southern Railway Company was the Appellant, and Joseph H. Clift was the Appellee, together with an assignment of errors, in term and bond by Appellant, in the words and figures following, to-wit (H. I.):

Placita.

Pleas Before the Honorable Simon L. Vandeveer, Judge of the Sixty-sixth Judicial Circuit of the State of Indiana and ex Officio Judge of the Gibson Circuit Court, at a Term of said Court Begun and Held at the Court House, in the City of Princeton, in Gibson County, Indiana, on the First Monday of May, in the Year of Our Lord One Thousand Nine Hundred and Thirteen, and at Subsequent Terms.

JOSEPH H. CLIFT

vs.

SOUTHERN RAILWAY COMPANY.

2 *Filing of Amended Complaint.*

Be it remembered, That on the 25th day of June, 1913, the same being the Forty-fifth Judicial Day of the May Term of said Gibson Circuit Court for the year 1913, the following proceedings were had by said court in the above entitled cause, to-wit:

"Comes the plaintiff by counsel and files an amended complaint in two paragraphs and on motion defendant is ruled to answer on the first day of the next term of this court."

Which said amended complaint is in the words and figures following, to-wit:

"STATE OF INDIANA,
County of Gibson, ss:

In the Gibson Circuit Court, May Term, 1913.

JOSEPH H. CLIFT

vs.

SOUTHERN RAILWAY COMPANY.

Amended Complaint.

Paragraph One.

3 Plaintiff complains of defendant and, for his first paragraph of amended complaint herein says, that said defendant is now, and during all the times herein mentioned has been, a common carrier of freight for hire from Lyles Station, in the county of Gibson, State of Indiana to the city of Marion, Grant County, in said state; that on, to-wit, the 16th day of August, 1911, plaintiff, by his agents, Griffin and Tichenor, delivered to said defendant at said station of Lyles, and said defendant then and

there received at said time and place, for transportation to said city of Marion, 923 good, sound, merchantable watermelons, at all times herein mentioned the property of this plaintiff and of the value of $62.30, in good shipping condition, there to be delivered — Carr & Company upon surrender of the Original Order Bill of Lading covering said melons, properly endorsed; that at the time said defendant accepted said melons as aforesaid, it issued a bill of lading covering said melons, of which bill of lading this plaintiff is now one of the lawful holders and owners; that said defendant transported said melons to the city of New Albany, Indiana, on their way to said destination and there delivered the same to the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, a connecting common carrier, for transportation to destination; that thereafter, while said melons were in the possession, care and control of said common carriers, through the negligence of said carriers as more particularly set forth in the claim hereinafter referred to and made a part hereof, said melons were wholly lost to this plaintiff to his damage in the sum of $62.30;

Plaintiff says further that on, to-wit, the 2nd day of September, 1911, and within four months from the date of the said shipment and after the arrival of said shipment at the said city of Marion, plaintiff presented to the agent of the defendant who issued the aforesaid bill of lading covering said melons, to-wit: the agent of said defendant in the city of Princeton, County of Gibson, State of Indiana, his claim in writing for the loss and damage to said watermelons, a copy of which claim, marked "Exhibit A" is attached hereto and hereby made a part hereof; that said claim was itemized and verified by plaintiff's agent, Moses C. Griffin, and briefly directed attention to the shipment in question and concisely stated plaintiff's said claim; that there was attached to said claim so presented as aforesaid the original bill of lading issued by said defendant covering said shipment; that claimant did not have at the time he presented said claim, has not now, and never has had the original paid freight bill covering said shipment; that said defendant still has and retains in its possession said original claim and bill of lading so filed; that at no time has the defendant made any request of this plaintiff for the original or copy of any paper in his possession, and issued by any carrier of said freight, pertaining to said shipment; that said defendant did not at any time within ninety days from the time said claim was so presented, nor did anyone in its behalf, either pay or reject said claim, in whole or in part, whereby said claim now stands admitted as a liability due and payable to the full amount thereof;

Wherefore, plaintiff prays judgment against said defendant in the sum of $62.30 and all other just and proper relief.

Paragraph Two.

Plaintiff, for his second and further paragraph of amended complaint herein says that said defendant is now, and during all the

times herein mentioned has been, a common carrier of freight for hire from Lyles Station, in the County of Gibson, State of Indiana to the city of Marion, Grant County, in said State; that on, to-wit, the 16th day of August, 1911, plaintiff, by his agents Griffin and Tichenor, delivered to said defendant at said station of Lyles, and said defendant then and there received at said time and place, for transportation to said city of Marion, 923 good, sound, merchantable water-melons, in good shipping condition, of the value of $62.30, at all times herein mentioned the property of this plaintiff, there to be delivered to Carr & Company upon surrender of the Original Order Bill of lading covering said melons properly endorsed; that at the time said defendant accepted said melons as aforesaid, it issued a bill of lading covering said melons, of which bill of lading this plaintiff is now one of the lawful holders and owners;

Plaintiff says further that said defendant transported said melons to the city of New Albany, Indiana on their way to their said destination and there delivered the same to the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, a connecting common carrier, for transportation to destination; that said defendant and its said connecting carrier, did not, nor did either of them promptly and safely transport and deliver said melons at their said destination as it was their duty to do; that said water-melons were what is known to common carriers as perishable freight and required prompt
6 handling to avoid loss to the owners, which fact was to each of said carriers at all times herein mentioned well known; that after said melons arrived at said city of Marion the consignee thereof refused to accept the same; that after said consignee had so refused to accept and receive said melons, the defendant and the said Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company each failed and neglected for a period of, to-wit, five days to notify this plaintiff that said melons were on hand at said city of Marion, refused and undisposed of; and did not so notify this plaintiff until, to-wit, the 27th day of August, 1911, at which time said melons had become and were utterly spoiled and worthless, that after the refusal of said Carr and Company to accept said melons as aforesaid the said defendant and the said Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company failed, neglected and refused to take any steps whatsoever to care for said melons, or to prevent their spoiling, and to dispose of said melons to the best advantage in the open market and thus prevent loss to this plaintiff; that had an effort been made so to do said melons could have been disposed of after the refusal of the said Carr and Company to accept the same as aforesaid without any loss to this plaintiff; that had this plaintiff been promptly notified of such refusal to so accept the said melons, he could and would, have disposed of said melons elsewhere and have thus avoided loss.

Plaintiff says further that the loss herein sued for was caused by each of the aforesaid acts of negligence on the part of each the defendant and the said Pittsburgh, Cincinnati, Chicago and St. Louis

Railway Company, and through no fault or negligence on
7 the part of this plaintiff; that plaintiff has done and performed all and singular all the things by him to be performed in connection with the said contract of shipment.

Wherefore, plaintiff prays judgment against said defendant in the sum of one hundred and fifty dollars and for all other just and proper relief.

T. MORTON McDONALD,
Attorney for Plaintiff."

"EXHIBIT A.

STATE OF INDIANA,
County of Gibson, ss:

Moses C. Griffin, being duly sworn on his oath says that this affiant and one George Tichenor, under the style and name of Griffin and Tichenor, acting as agents for J. H. Clift, Oscar Clark and J. Spore, on the 16th day of August, 1911 delivered to the Southern Railway Company 1,185 water melons for transportation to Marion, Indiana, there to be delivered to Carr & Company upon presentation of bill of lading; that said melons were at said time in good shipping order and in good condition and were good merchantable melons; that 923 of said melons of the value of $62.30 were the property of J. H. Clift; that 194 of said melons of the value of $13.10 were the property of Oscar Clark and 68 of said melons of the value of $4.59 were the property of J. Spore; that the Southern Railway Company at the time it accepted said shipment issued and delivered to this affiant an "Order Bill of Lading" therefore which provided among other things that "Inspection of property covered by this bill of lading will not be permitted unless
8 provided by law or unless permission is endorsed on this original bill of lading or given in writing by the shipper"; that no such permission was ever given by shippers; that after said melons arrived at destination the carrier wrongfully and without right permitted the consignee to enter said car and inspect the contents and remove a portion of said contents therefrom without requiring a surrender of the original "Order Bill of Lading"; that after so entering and inspecting said car and contents consignee wrongfully and without right refused to accept the same and wrongfully claimed that said melons were not what they had been represented to be; that the carrier failed to give prompt notice to claimants of the refusal of consignee to accept said car and failed to take any steps to dispose of said melons or to protect the interests of shippers in any way whatever; that water melons are perishable goods and require prompt handling to avoid loss.

J. H. Clift hereby presents claim for $62.30; Oscar Clark hereby presents claim for $13.10 and J. Spore hereby presents claim for $3.59.

Claimants say further that the carrier failed to take any measures to dispose of said melons or otherwise prevent a total loss thereof but held said melons on board car at Marion, Indiana until the same were spoiled and rendered wholly useless to the claimants.

To the above claims should also be added any freight or transportation charges that may have accrued in connection with this car of melons which the carrier may have charged to these claimants as the above amounts do not include such charges and claimants have not the amount thereof.

There is also attached hereto the Original "Order Bill of lading" issued by Southern Railway Company covering this ship-
9 ment.

The affiant says further that he makes this affidavit as agent of claimants and for and in their behalf and that each and all the facts herein set forth are true and correct as he is informed and verily believes.

MOSES C. GRIFFIN.

Subscribed and sworn to before me this the 2nd day of September, 1911.

My commission expires September 3, 1911.

THOMAS M. McDONALD,
Notary Public.

And afterward, to-wit, on the 11th day of September, 1913, the same being the Fourth Judicial Day of the September Term of said court for the year 1913, the following proceedings were had by said Court in said cause, to-wit:

Motion to Strike Out Parts of First Paragraph of Complaint and Motion to Make Amended Complaint More Specific Filed.

"Comes the defendant by counsel and moves the court to strike out parts of first paragraph of amended complaint and comes the defendant and moves the court to make second paragraph of amended complaint more specific."

Which said motion to strike out is in the words and figures following, to-wit:

10 "In the Gibson Circuit Court, September Term, 1913.

JOSEPH H. CLIFT

VS.

SOUTHERN RAILWAY COMPANY.

Motion to Strike Out Parts of First Paragraph of Amended Complaint.

The defendant moves the court to strike out and eliminate from the first paragraph of the amended complaint in this cause the following words, to-wit:

"that thereafter, while said melons were in the possession, care and control of said common carriers, through the negligence of said carriers as more particularly set forth in the claim hereinafter referred to and made a part hereof, said melons were wholly lost to this plaintiff to his damage in the sum of $62.30;"

EMBREE & EMBREE,
Attorneys for Defendant."

And which said motion to make more specific is in the words and figures following, to-wit:

"In the Gibson Circuit Court, May Term, 1913.

JOSEPH H. CLIFT

vs.

SOUTHERN RAILWAY COMPANY.

Motion to Make Amended Complaint More Specific.

11 The defendant moves the court to make an order requiring the plaintiff to make the second paragraph of the amended complaint more specific in each one severally of the particulars following, to-wit:

1. That he set forth therein, whether or not the shipment referred to was made in the name of the plaintiff.

2. That he set forth therein the name of the person or persons to whom the bill of lading, referred to in said paragraph, was in terms issued.

3. That he set forth in said paragraph a copy of the said bill of lading or that he make said bill of lading or a copy thereof as an exhibit.

4. That the plaintiff set forth in said paragraph the fact or facts, if any there were, whereby the defendant or its connecting carrier, mentioned in the complaint, or any agent or agents of the defendant or of said connecting carrier, had any knowledge that the water melons mentioned in the complaint were the property of the plaintiff or that the plaintiff was in any way interested therein or was entitled to notice of the refusal of the consignee to accept the same.

EMBREE & EMBREE,
Attorneys for Defendant."

And afterward, to-wit, on the 3rd day of November, 1913, the same being the First Judicial Day of the November Term of said Court for the year 1913, the following proceedings were had by said court in said cause, to-wit:

12 *Motion to Strike Out Parts of First Paragraph of Amended Complaint Sustained. Demurrer to Second Paragraph of Amended Complaint Filed.*

"Come the parties and the court being advised in the premises sustains motion to strike out parts—first paragraph. And comes the plaintiff and files a demurrer to second paragraph of plaintiff's complaint."

Which said demurrer to the second paragraph of the amended complaint is in the words and figures following, to-wit:

"In the Gibson Circuit Court, November Term, 1913.

JOSEPH H. CLIFT

vs.

SOUTHERN RAILWAY COMPANY.

Demurrer to Second Paragraph of Amended Complaint.

The defendant demurs to the second paragraph of the amended complaint for the reason that it appears upon the face of said paragraph that said paragraph does not state facts sufficient to constitute a cause of action.

EMBREE & EMBREE,
Attorneys for Defendant."

Memorandum.

The second paragraph of the amended complaint is insufficient for want of facts in the particulars following, to-wit:

13 1. That the said paragraph does not show that the loss was caused by the defendant or any connecting carrier.

EMBREE & EMBREE,
Attorneys for Defendant."

And afterward, to-wit, on the 15th day of November, 1913, the same being the Twelfth Judicial Day of said term of said court, the following proceedings were had by said court in said cause, to-wit:

Demurrer to First Paragraph of Amended Complaint Filed.

"Comes the defendant by counsel and files a demurrer to first paragraph of amended complaint."

Which said demurrer to the first paragraph of the amended complaint is in the words and figures following, to-wit:

"In the Gibson Circuit Court, November Term, 1913.

JOSEPH H. CLIFT

VS.

SOUTHERN RAILWAY COMPANY.

Demurrer to First Paragraph of Amended Complaint.

The defendant demurs to the first paragraph of the amended
14 complaint in this cause for the reason that it appears upon the face of said paragraph:

1. That said paragraph does not state facts sufficient to constitute a cause of action.

EMBREE & EMBREE,
Attorneys for Defendant."

Memorandum.

The paragraph of complaint mentioned in the above and foregoing demurrer is insufficient in each one severally of the particulars following, namely:

1. That it does not appear upon any allegation of fact in said paragraph that the claim therein mentioned was verified by the plaintiff, by his agent, attorney or officer:

2. That it does not appear upon any allegation of fact in said paragraph that the claim therein mentioned was made by the plaintiff:

3. That it does not appear upon any allegation of fact in said paragraph that there was any loss of, or damage to, the melons therein mentioned while the same were in the possession of the defendant, or of the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, in its capacity of a common carrier:

4. That it appears upon the face of said paragraph that the alleged loss and damage to said melons occurred while said melons were in the possession of the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, in its capacity of a warehouseman, and after said defendant had ceased to be a carrier thereof:

5. That under the facts averred in said paragraph, the defendant is not subject to any liability arising out of the provisions of any statute of this state:

6. That there was not, at the time of the alleged happening of the matters disclosed by said paragraph, nor is there
15 now, any statute of this state by effect of which the defendant is liable under the facts in said paragraph averred:

7. That the alleged claim, a copy of which is referred to in said paragraph as Exhibit A, is not a written instrument upon which said paragraph is founded, and the same is not a part of said paragraph:

8. That there is in said paragraph no allegation of fact whereby it appears that there was any loss of, or damage to, the melons therein mentioned:

9. That it appears upon the face of the paragraph that the ultimate carrier performed its whole duty by notifying Carr & Company of the arrival of the melons at destination:

10. That it does not appear by any allegation of fact that the order bill of lading was endorsed by the shippers therein named, or by the plaintiff, or by any other person.

EMBREE & EMBREE,
Attorneys for Defendant."

And afterward, to-wit, on the 24th day of November, 1913, the same being the Nineteenth Judicial Day of said term of said court, the following proceedings were had by said court in said cause, to-wit:

Demurrers to First and Second Paragraphs of Amended Complaint Sustained.

"Come the parties by counsel and the court being advised in the premises sustains defendant's demurrers to first and second paragraphs of amended complaint to which ruling the plaintiff excepts."

16 And afterward, to-wit, on the 28th day of November, 1913, the same being the Twenty-third Judicial Day of said term of said court, the following proceedings were had by said court in said cause, to-wit:

Third Paragraph of Amended Complaint Filed.

"Comes the plaintiff by counsel and files a third paragraph of amended complaint."

Which said third paragraph of amended complaint is in the words and figures following, to-wit:

"STATE OF INDIANA,
County of Gibson, ss:

In the Gibson Circuit Court, November Term, 1913.

JOSEPH H. CLIFT
vs.
SOUTHERN RAILWAY COMPANY.

Third Paragraph of Amended Complaint.

Plaintiff complains of defendant and, for his third additional paragraph of his amended complaint herein says, that said defendant is now and during all the times herein mentioned has been, a common carrier of freight for hire from Becks Station, in
17 the county of Gibson, state of Indiana, to the city of Marion, Grant County, in said State; that on, to-wit, the 16th day of August, 1911, plaintiff, by his agents Griffin and Tichenor delivered to said defendant at said station of Becks, and said defendant then and there received at said time and place, for transportation to said city of Marion, 923 good, sound, merchantable water melons, at all times herein mentioned the property of this plaintiff and of the value of $62.30, in good shipping condition, there to be delivered — Carr & Company upon surrender of the Original Order Bill of Lading covering said melons, properly endorsed; that at the time said defendant accepted said melons, as aforesaid, it issued a bill of lading covering said melons, of which bill of lading this plaintiff is now one of the lawful holders and owners; that said defendant transported said melons to the city of New Albany, Indiana on their way to said destination and there delivered the same to the Pittsburgh, Cincinnati, Chicago, and St. Louis Railway Company, a connecting common carrier for transportation to destination; that thereafter, after said melons had been transported to said city of Marion, and after they were ready for delivery to the consignee thereof, and while they were in the possession, care and control of said Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, through the negligence of said carriers as more particularly set forth in the claim hereinafter set out, said melons were wholly lost to this plaintiff to his damage in the sum of $62.30;

Plaintiff says further that on, to-wit, the 2nd day of September, 1911, and within four months from the date said shipment
18 was made, and after the arrival of said shipment at the said city of Marion, plaintiff presented to the agent of the defendant who issued the said bill of lading covering said melons, to-wit, the agent of said defendant in the city of Princeton, county of Gibson, state of Indiana, his claim in writing for the loss and damage to said water melons, which claim was itemized and verified by one Moses Griffin, as agent of plaintiff in so doing and briefly directed attention to the shipment in question and concisely stated plaintiff's said claim and in words and figures following, to-wit:

STATE OF INDIANA,
County of Gibson, ss:

Moses C. Griffin, being duly sworn on his oath says that this affiant and one George Tichenor, under the style and name of Griffin and Tichenor, acting as agents for J. H. Clift, Oscar Clark and J. Spore, on the 16th day of August, 1911 delivered to the Southern Railway Company 1,185 watermelons for transportation to Marion, Indiana there to be delivered to Carr & Company upon presentation of Bill of Lading; that said melons were at said time in good shipping order and in good condition and were good merchantable melons; that 923 of said melons of the value of $62.30 were the property of J. H. Clift; that 194 of said melons of the value of $13.10 were the property of Oscar Clark and 68 of said melons of the value of $4.59 were the property of J. Spore; that the Southern Railway Company at the time it accepted said shipment issued and delivered to this
19 affiant an "Order Bill of Lading" therefor which provided among other things that "Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by the shipper; that no such permission was ever given by shippers; that after said melons arrived at destination the carrier wrongfully and without right permitted the consignee to enter said car and inspect the contents and remove a portion of said contents therefrom without requiring a surrender of the original "Order Bill of Lading"; that after so entering and inspecting said car and contents consignee wrongfully and without right refused to accept the same and wrongfully claimed that said melons were not what they had been represented to be; that the carrier failed to give prompt notice to claimants of the refusal of consignee to accept said car and failed to take any steps to dispose of said melons or to protect the interests of shippers in any way whatever; that watermelons are perishable goods and require prompt handling to avoid loss.

J. H. Clift hereby presents claim for $62.30; Oscar Clark hereby presents claim for $13.10 and J. Spore hereby presents claim for $4.59.

Claimants say further that the carrier failed to take any measures to dispose of said melons or otherwise prevent a total loss thereof but held said melons on board car at Marion, Indiana until the same were spoiled and rendered wholly useless to the claimants.

To the above claims should also be added any freight or transportation charges that may have accrued in connection with this car of melons which the carrier may have charged to these claimants as the above amounts do not include such charges and claimants have not the amount thereof.

20 There is also attached hereto the Original "Order bill of lading" issued by Southern Railway Company covering this shipment.

The affiant says further that he makes this affidavit as agent of claimants and for and in their behalf and that each and all the facts

herein set forth are true and correct as he is informed and verily believes.

MOSES C. GRIFFIN.

Subscribed and sworn to before me this the 2nd day of September, 1911.

My commission expires September 3rd, 1911.

THOMAS M. McDONALD,
Notary Public.

Form 414.

Southern Railway Company.

Order Bill of Lading—Original.

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at Princeton, Indiana, 8/16, 1911, from Griffin & Tichenor the property described below, in apparent good order, except as noted (contents and condition of packages unknown) marked, consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its line, otherwise to deliver to another carrier on the route to said destination it is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions whether printed
21 or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

This Bill of Lading is assignable; it is negotiable only in so far as may be required to carry out the promise of the carrier made in the following surrender clause, and is enforceable as provided in Section 10 of this Bill of Lading, according to its original tenor and effect.

The surrender of this Original Order Bill of Lading properly endorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by the shipper.

The Rate of Freight from —— to —— is in Cents per 100 Lbs.
Consigned to Order of Griffin & Tichenor.
Destination: Marion, State of Indiana, County of ——.
Notify Carr & Co., at Marion, State of Indiana, County of ——.
Route: Penna. Car Initial Sou. Car. No. 30236.

No. packages.	Description of articles and special marks.	Weight (subj. to correction).	Class or rate.	Ck. col.
.....	Melons or L. & C.	24,000	.....	.....

Loaded at Becks.

A. McFATRIDGE,
Agent,
Per M.

GRIFFIN & TICHENOR,
Shipper,
Per —— ——.

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

22 Conditions.

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property, or from riots or strikes; or for country damage on cotton. When in accordance with general custom on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence.

In case of quarantine the goods may be discharged at risk and expense of owners into quarantine depot or elsewhere as 23 required by quarantine regulations or authorities, or for the carrier's despatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when goods are so discharged, or goods may be returned by carriers at owner's expense and risk to shipping point, earning freight both

ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carriers shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required by quarantine regulations or authorities, even though same may have been done by carrier's officers, crew agents or employes nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

Section 2. In issuing this bill of lading this company agrees to transport only over its own line, and, except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law.

Sec. 3. No carrier is bound to transport said property by any train or vessel, or in time for any particular market or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability
24 of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occurs from negligence.

Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in han-

dling or forwarding and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier or warehouse subject to reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from trains, or until loaded into and after unloaded from vessels.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in Section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and ex-

emptions provided by statute and to the conditions contained in t
bill of lading not inconsistent with such statutes or this section, a
subject also to the condition that no such carrier or party in pos
sion shall be liable for any loss or damage resulting from the pe
of the lakes, sea or other waters; or from vermin, leakage, chafi
breakage, heat, frost, wet, explosion, bursting of boilers, breakage
shafts, or any latent defect in hull, machinery or appurtenanc
whether existing prior to, at the time of, or after sailing; or uns
worthiness; or from collision, stranding or other accidents of navi
tion, or from prolongation of the voyage. And any vessel carryi
any or all of the property herein described shall have the l
27 erty to call at any port or ports, to tow and be towed, to tra
fer, to tranship, to lighter, to load and discharge goods at a
time, and assist vessels in distress, and to deviate for the purpose
saving life or property. Such water carrier shall not be responsi
for any loss or damage to property if it be necessary or is usual
carry such property upon deck.

The term "water carriage" in this section shall not be constru
as including lighterage across rivers or in lake or other harbors wh
performed by the rail carrier, and the liability for such lighters
shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of ladi
which shall be made without an indorsement thereof hereon, sign
by the agent of the carrier issuing this bill of lading, shall be wi
out effect, and this bill of lading shall be enforceable according to
original tenor.

Plaintiff says further that he is the identical person referred to
the foregoing claim as J. H. Clift; that there was attached to sa
claim so presented as aforesaid the original bill of lading issued
said defendant covering said shipment; that claimant did not ha
at the time he presented said claim, has not now, and never *had* h
the original paid freight bill covering said shipment; that said d
fendant still has and retains in its possession said original claim a
bill of lading so filed; that at no time has the defendant made a
request of this plaintiff for the original or copy of any paper in h
possession, and issued by any carrier of said freight, pertai
28 ing to said shipment; that said defendant did not at any ti
within ninety days from the time said claim was so presente
nor did anyone in its behalf, either pay or reject said claim, in wh
or in part; whereby said claim now stands as a liability due and pa
able to the full amount thereof;

Wherefore, plaintiff prays judgment against said defendant in t
sum of $62.30 and all other just and proper relief.

T. MORTON McDONALD,
Attorney for Plaintiff."

And afterward, to-wit, on the 1st day of December, 1913, the sam
being the 25th Judicial Day of said term of said court for the ye
1913, the following proceedings were had by said court in said caus
to-wit:

Rule to Answer.

"On motion defendant is ruled to answer by December 6th, 1913."

And afterward, to-wit, on the 10th day of March, 1914, the same being the 8th Judicial Day of the March Term of said court for the year 1914, the following proceedings were had by said court in said cause, to-wit:

Demurrer to Third Paragraph of Amended Complaint Filed.

"Comes the defendant by counsel and filed a demurrer to third paragraph of plaintiff's amended complaint."

Which said demurrer is in the words and figures following, to-wit:

"In the Gibson Circuit Court, March Term, 1914.

JOSEPH H. CLIFT

vs.

SOUTHERN RAILWAY COMPANY.

Demurrer.

The defendant demurs to the third paragraph of the amended complaint in this cause for the reason that it appears upon the face of said paragraph

1. That said paragraph does not state facts sufficient to constitute a cause of action.

EMBREE & EMBREE,
Attorneys for Defendant.

Memorandum.

The paragraph of amended complaint mentioned in the above and foregoing demurrer is insufficient in each one severally of the particulars following, namely:

1. That it does not appear upon any allegation of fact in said paragraph that the claim therein mentioned was verified by the plaintiff or by his agent, attorney or officer;

2. That it does not appear upon any allegation of fact in said paragraph that the claim therein mentioned was made by the plaintiff:

3. That it does not appear upon any allegation of fact in said paragraph that there was any loss of or damage to the melons therein mentioned while the same were in the possession of the defendant or

of the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company in its capacity of a common carrier:

4. That it appears upon the face of said paragraph that the alleged loss and damage to said melons occurred while said melons were in the possession of the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company in its capacity of a warehouseman and after said defendant had ceased to be a carrier thereof:

5. That under the facts averred in said paragraph the defendant is not subject to any liability arising out of the provisions of any statute of this state:

6. That there was not, at the time of the alleged happening of the matters disclosed in said paragraph, nor is there now, any statute of this state by effect of which the defendant is liable under the facts in said paragraph averred:

7. That there is in said paragraph no allegation of fact whereby it appears that there was any loss of, or damage to, the melons therein mentioned:

8. That it appears upon the face of the paragraph that the ultimate carrier performed its whole duty by notifying Carr & Company of the arrival of the melons at destination:

9. That it does not appear by any allegation of fact that the order bill of lading was endorsed by the shippers therein named, or by the plaintiff, or by any other person.

(Signed) EMBREE & EMBREE,
Attorneys for Defendant."

31 And afterwards, to-wit, on the 8th day of May, 1914, the same being the 5th Judicial Day of the May Term of said cause for the year 1914, the following proceedings were had by said court in said cause, towit:

Demurrer to Third Paragraph of Amended Complaint Sustained.

"Come the parties by counsel and the court being advised sustains defendant's demurrer to plaintiff's third paragraph amended complaint to which ruling of the court the plaintiff excepts."

And afterwards, to-wit, on the 11th day of June, 1914, the same being the 34th Judicial Day of said term of said court, the following proceedings were had by said court in said cause, to-wit:

Judgment.

"Comes the plaintiff by counsel and refuses to plead further whereupon it is considered and adjudged that the plaintiff take nothing by his suit herein and that the defendant recover its costs.

And now plaintiff prays an appeal to the Appellate Court which is granted."

32 And afterwards, to-wit, on the 31st day of May, 1920, the same being the 25th Judicial Day of the May Term of said court for the year 1920, the following proceedings were had by said court in said cause, to-wit:

"It is now ordered by the court that the opinion of the Supreme Court rendered in this cause be now spread on Order Book of this court, and the defendant is now ruled to answer."

Supreme Court opinion is as follows:

STATE OF INDIANA:

In the Supreme Court, May Term, 1919, on the 17th Day of October, 1919 Being the 125th Judicial Day of the May Term, 1919.

In the Case of

#23170.

JOSEPH H. CLIFT

vs.

SOUTHERN RAILWAY COMPANY.

Appealed from the Gibson Circuit Court.

Opinion.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Harvey, J.:

Cause transferred to this court for want of jurisdiction in the appellate court.

This is an action to recover of appellee the amount of a claim for lost and damaged freight, which claim is alleged to have been
33 admitted by appellee to be owing appellant because the claim was either "paid or rejected by such carrier within ninety days" of its presentation.

This cause of action is based upon the provisions of the Act of March 4, 1911, (Burns, 1914), and is not an action to enforce any common law remedy against the railroad company for damage to or failure to deliver freight.

The rights and remedies of the parties depend, in this action, upon the validity of said Act, the facts relating to the filing of said claim and the conduct of appellee in reference to the claim filed.

The third paragraph, and the only paragraph of complaint then before the court was held insufficient upon demurrer for want of

facts, and judgment was rendered upon plaintiff's failure to plead further. The only question here is as to whether the court's ruling upon demurrer was erroneous.

The Act is, so far at least as the initial carrier is concerned not in contravention of the constitution of the United States. For reasons see: Seaboard Air Line Railway v. Seegers Bros., 52nd Law Ed. U. S. p. 110; Kansas City Southern Railway Company v. Anderson, 233 U. S. p. 325.

For the same reasons it is not in contravention of the Constitution of the State of Indiana.

The claim so filed states that Griffin & Tichenor, as agents for appellant, delivered to appellee nine hundred and twenty-three watermelons of the value of sixty-two dollars, for transportation to Marion, Indiana, there to be delivered to Carr & Company, upon presentation of the bill of lading; that said melons were at the time of delivery to appellee in good and merchantable condition.

34 That at Marion the carrier wrongfully, in violation of the terms of the bill of lading allowed Carr & Company to enter the car and inspect the melons and remove a portion thereof without a surrender of the bill of lading. That appellee failed to notify appellant of the refusal of Carr & Company to accept said melons, and failed to take any steps to dispose of said melons, or to protect the interests of appellant. That said melons were so held at Marion until the same became spoiled and wholly useless to claimants.

To this claim was attached the original bill of lading, which shows that the property was received at Princeton, Indiana "from Griffin & Tichenor," and consigned to the order of Griffin & Tichenor, destination Marion, Indiana, notify Carr & Company," and said bill was signed "Griffin & Tichenor, shippers."

The complaint alleged that within four months from date of said shipment, and after the arrival of said shipment at the city of Marion, plaintiff presented to the agent of the defendant, who issued the bill of lading, at said City of Princeton, his claim in writing for loss of and damage to said melons, which claim was itemized and verified by one Moses C. Griffin, as agent for the plaintiff, and that to said claim was attached to the original paid freight bill received on account of said shimpent; that *that* the defendant, appellee, did not at any time within ninety days from the time said claim was so presented, nor did anyone in its behalf, either pay or reject said claim, in whole or in part.

Appellee claims that said complaint fails to allege a number of things which appellee believes to be material, the absence of which renders said complaint insufficient. For instance, that there

35 is no allegation that the "Order bill of lading" was endorsed, nor does there appear upon the copy of the bill of lading attached to the alleged claim any writing purporting to be an endorsement thereof; that there is no allegation that Carr & Company ever had the bill of lading in their possession; that there is no allegation of fact whereby it appears that the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company could have delivered the melons to Carr & Company without breaching the contract as

same is evidenced by the bill of lading; that the claim itself set out in the complaint shows upon its face that appellant did not present a claim to the agent of appellee; but that the same was presented by other parties; that the bill of lading was not issued to appellant, but to the order of Griffin & Tichenor. That there is no allegation that appellee, Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company ever had any knowledge or notice that appellant was the owner of any part of the melons, or had any interest in them; there is no allegation that Griffin & Tichenor were not notified by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company of the alleged refusal of Carr & Company to accept the melons; that there is no allegation that appellant did not have knowledge of the refusal of Carr & Company, nor that his alleged agent did not have such knowledge within a reasonable time after such refusal; that the facts pleaded disclose that appellant was not the lawful holder of said bill of lading.

From the complaint it sufficiently appears that the claim was properly filed for and on behalf of appellant by appellant's agents, and that if appellee was liable to anyone, it was liable to appellant, rather than Griffin & Tichenor, and that appellant was the lawful holder of the bill of lading, although the same may have been in the possession of Griffin & Tichenor, his agents.

36 The claim filed discloses appellant's interest, and if appellee had doubt on this question, it could easily have protected itself by rejecting the claim.

Allegations as to the conduct of the railroad companies, or their failure to act in reference to the preservation of the melons, notice, etc., would be essential to a good complaint in a common law action for damages; but they are not essential to a complaint which seeks to recover because the defendant did not within the time limited pay or reject said claim, in whole or in part.

The complaint shows that appellant is one of the class of persons entitled to recover under this statute. It is disclosed by the complaint, and admitted by demurrer, that the plaintiff was the owner of the melons for which he filed the claim; and it is admitted that said melons were shipped by appellant through his agents. It is admitted that the same did not come to the hands of the persons to whom they were to be delivered. Enough is disclosed to show that the claim was not fictitious and that it was filed by one who had the dealing with appellee, and who, under the statute, was entitled to have his claim acted upon within ninety days, and to be informed within said time of the appellee's action upon the claim.

No question is here presented as to whether appellant if he desire to pursue his claim after the railroad company has failed to act upon the same, should have taken the same up with the railroad commission, or its successor, the public service commissions.

The paragraph was sufficient, and the demurrer should have been overruled.

37 Judgment reversed with directions for further proceedings in accord herewith.

It is therefore considered by the court that the judgment of the Court below in the above entitled cause, be in all things reversed at the cost of the appellee all of which is ordered to be certified to said court.

And it is further considered by the Court, that the appellant recover of the appellee the sum of — for his costs and charges in this behalf expended.

THE STATE OF INDIANA:

Supreme Court.

I, Patrick J. Lynch, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said court in the above entitled cause.

In witness whereof, I hereto set my hand and affix the seal of said Court, at the city of Indianapolis, this 28th day of May, 1920.

PATRICK J. LYNCH,
C. S. C."

And afterward, to-wit, on the 13th day of September, 1920, the same being the 1st Judicial Day of the September Term of said Court for the year, 1920, the following proceedings were had by said court in said cause, to-wit:

38 *Rule to Answer Vacated. Demurrer to Third Paragraph of Amended Complaint Withdrawn. Demurrer to Third Paragraph of Amended Complaint Filed.*

"Come again the parties and the rule heretofore entered against the defendant to answer is by the court vacated and set aside, and now the defendant asks leave of the court to withdraw the demurrer heretofore filed and now pending to the third paragraph of the amended complaint and the court being sufficiently advised in the premises grants such leave, and now the defendant withdraws the demurrer to the third paragraph of the amended complaint, and now the defendant filed its demurrer to the third paragraph of the amended complaint.

Which said demurrer was in the words and figures following, to-wit:

"In the Gibson Circuit Court, September Term, 1920.

JOSEPH H. CLIFT

vs.

SOUTHERN RAILWAY COMPANY.

Demurrer to Third Paragraph of Amended Complaint.

The defendant in the above entitled cause demurs to the third paragraph of the amended complaint in said cause for the reason that it appears upon the face of said paragraph.

1. That said paragraph does not state facts sufficient to constitute a cause of action, as more fully appears by the memorandum
39 hereunto attached and filed herewith.

JOHN D. WELMAN,
EMBREE & EMBREE,
Attorneys for Defendant.

Memorandum.

The paragraph of the amended complaint mentioned in the above and foregoing demurrer is insufficient for want of facts in each one severally of the particulars following, to-wit:

(*a*) That the act upon which said paragraph is based, viz., the Act of March 4, 1911, of the General Assembly of the State of Indiana, Burns, 1914, Section 3920*b* and 3920*h*, is unconstitutional and void in that it is contrary to the Fourteenth Amendment to the Constitution of the United States, as depriving the defendant of its property without due process of law, and denying to the defendant the equal protection of the laws; and otherwise unconstitutional under the Constitution of the United States:

(*b*) That the cause of action sought to be pleaded in said paragraph is based upon that part of section three of Chapter 183 of the Acts of the General Assembly of the State of Indiana of the year 1911, Acts 1911, p. 454; Burns, 1914, Section 3920*d*, which is in these words: "and if neither paid nor rejected in whole or in part within such time, such claim shall stand admitted as a liability due and payable to the full amount thereof against any such carrier, and may be recovered in any court having competent jurisdiction." Which part of said section is unconstitutional and void since otherwise it has force and effect to deny to the carrier its day in court, to invade the province of the judiciary, to make the mere fact
40 that the carrier had not paid, or rejected the claim presented to it within ninety days, conclusive evidence of its liability and of the measure thereof, to deprive the carrier of its property without due process of law and to deny to the carrier the equal protection of the laws, each and every one of which said consequences is in con-

flict with, and contrary to, the Fourteenth Amendment to the Constitution of the United States of America, U. S. Constitution Art. XIV, Section 1.

(*c*) That the cause of action sought to be pleaded in said paragraph is based upon that part of section three of Chapter 183 of the Acts of the General Assembly of the State of Indiana of the year 1911, Acts 1911, page 454, which is in these words: "and if neither paid nor rejected in whole or in part within such time, such claim shall stand admitted as a liability due and payable to the full amount thereof against any such carrier, and may be recovered in any court having competent jurisdiction," which said part of said section is unconstitutional and void, since otherwise it has force and effect to deny to the carrier its day in court, to invade the province of the judiciary, to deprive the carrier of its property without compensation, nor for a public use and without due process of law, to grant to the claimant "privileges and immunities, which upon the same terms, shall not equally belong to all citizens" and to make the failure to pay, or reject, the claim presented to it, within ninety days, conclusive evidence against the carrier, both of liability, and of the measure thereof, each and every one of which said consequences is in conflict with, and contrary to, provisions of the Constitution
41 of the State of Indiana, namely, Article I, Sections 1, 21, 23; Article III, Section 1; Article VII, Section 1.

(*d*) That there is not now, nor ever has been, any law in force in the State of Indiana which entails liability upon the defendant on account of its failure to pay, or reject, the claim mentioned in said paragraph, in whole or in part, within ninety days.

JOHN D. WELMAN,
EMBREE & EMBREE,
Attorneys for Defendant."

And afterwards, to-wit, on the 15th day of September, 1920, the 3rd Judicial Day of said term of said court, the following proceedings were had by said court in said cause, to-wit:

Overruling Demurrer to Third Paragraph of Amended Complaint. Exception.

"Come again the parties and the court being sufficiently advised in the premises overrules the demurrer filed by the defendant to the third paragraph of the amended complaint, on the first Judicial Day of the present term of this court; to the overruling of which said demurrer the defendant at the time excepts, and now the defendant elects to stand upon its demurrer, and refuses to plead further.

It is, therefore, considered and adjudged by the court that the plaintiff do recover of and from the defendant the sum of One Hundred and Five Dollars and fifteen cents, together with his costs
42 in this action laid out and expended. And *And* now the defendant prays an appeal from said judgment to the Supreme Court of Indiana, which appeal is by the Court granted upon condi-

tion that, within thirty days next hereafter, the defendant shall file with the clerk of this court its appeal bond, payable and conditioned as required by law, in the penal sum of five hundred dollars, with Aetna Casualty and Surety Company as its surety thereon, which said surety is now approved by the court."

And afterwards, to-wit, on the 9th day of October, 1920, the same being the 24th Judicial Day of said term of said court, the following proceedings were had by said court in said cause, to-wit:

"Come again the parties and now the defendant in open court files its appeal bond in the penal sum of Five Hundred Dollars payable and conditional as required by law, and by the order of this court with Aetna Casualty and Surety Company as its surety thereon and it is ordered by the court that said bond be made a part of the record."

43 *Filing of Appeal Bond.*

And afterwards, to-wit, on the 11th day of October, 1920, the defendant filed in the office of the Clerk of the Gibson Circuit Court its Appeal Bond in the words and figures, following, to-wit:

Appeal Bond.

Know all men by these presents, that Southern Railway Company, as principal, and Aetna Casualty and Surety Company, as surety, are held and firmly bound unto Joseph H. Clift in the penal sum of Five Hundred Dollars, for the payment of which well and truly to be made, they bind themselves and their successors firmly by these presents.

Sealed and dated this 11th day of October, 1920.

The condition of the above and foregoing bond and obligation is such that Whereas on the 15th day of September, 1920, by the consideration of the Gibson Circuit Court, within and for Gibson
44 County, in the State of Indiana, the above named, Joseph H. Clift recovered a judgment against said Southern Railway Company in the sum of One Hundred and Five Dollars and Fifteen cents, together with his costs in the action, for which said judgment said company has prayed an appeal to the Supreme Court of Indiana.

Now, therefore, if said Southern Railway Company shall duly prosecute its said appeal, and abide by and pay the judgment and costs which may be rendered or affirmed against it, then this bond and obligation shall be void; otherwise in full force and effect.

SOUTHERN RAILWAY COMPANY,
By JOHN D. WELMAN,
[SEAL] *Attorney in Fact.*
AETNA CASUALTY AND SURETY COMPANY,
By ROLLIN MAXAM, *Attorney in Fact.*

Filed Dec. 6, 1920.
PATRICK J. LYNCH,
Clerk.

45 *Filing Præcipe.*

And afterwards, to-wit, on the 12th day of October, 1920, the defendant filed in the office of the Clerk of the Gibson Circuit Court its præcipe for a transcript in the words and figures following, to-wit:

Filed Dec. 6, 1920. Patrick J. Lynch, Clerk.

In the Gibson Circuit Court, September Term, 1920.

JOSEPH H. CLIFT

vs.

SOUTHERN RAILWAY COMPANY.

Præcipe.

The Clerk of the Gibson Circuit Court will please prepare, authenticate and deliver to the defendant in the above entitled cause, to be used on appeal from judgment in said cause, to the Supreme Court of Indiana, a transcript of all of the papers and entries in said cause, filed and made on, and subsequent to, the 25th day of June, 1913, including therein:

1. The entry of June 25, 1913, showing the filing of the amended complaint and rule to answer.

2. The amended complaint.

3. The entry of September 11, 1913, showing the filing by the defendant of the motion to strike out parts of the first para-
46 graph of the amended complaint, and the motion to make the second paragraph of the amended complaint more specific.

4. The motion to strike out parts of the first paragraph of the amended complaint.

5. The motion to make the second paragraph of the amended complaint more specific.

6. The entry of November 3, 1913, showing the sustaining of the motion to strike out parts of the first paragraph of the amended complaint, and filing of demurrer to the second paragraph of the amended complaint.

7. The demurrer to the second paragraph of the amended complaint.

8. The entry of November 15, 1913, showing the filing of the demurrer to the first paragraph of the amended complaint.

9. The demurrer to first paragraph of the amended complaint.

10. The entry of November 24, 1913, showing the sustaining of the demurrers to the first and second paragraphs of the amended complaint.

11. The entry of November 28, 1913, showing the filing of the third paragraph of the amended complaint.

12. The third paragraph of the amended complaint.

13. The entry of December 1, 1913, showing the rule to answer the third paragraph of the amended complaint.

14. The entry of March 10, 1914, showing the filing of the demurrer to the third paragraph of the amended complaint.

15. The demurrer to the third paragraph of the amended complaint.

Filed December 6, 1920. Patrick J. Lynch, Clerk.

47 16. The entry of May 8, 1914, showing the sustaining of the demurrer to the third paragraph of the amended complaint and exception.

17. The entry of June 11, 1914, showing the refusal of the plaintiff to plead further, final judgment and appeal.

18. The entry of May 31, 1920, showing the spreading of record of the opinion of the Supreme Court of Indiana and rule to answer.

19. The entry of September 13, 1920, showing the *the* vacation of the rule to answer, the withdrawal of the demurrer to the third paragraph of the amended complaint, the filing of the demurrer to the third paragraph of the amended complaint.

20. The demurrer to the third paragraph of the amended complaint filed on the 13th day of September, 1920.

21. The entry of September —, 1920, showing the overruling of the demurrer to the third paragraph of the amended complaint, the defendant's exception and election to stand upon its demurrer and its refusal to plead further, the final judgment, the prayer for an appeal, the granting thereof and the fixing of the appeal bond.

EMBREE & EMBREE,
Attorneys for Defendant."

Filed Dec. 6, 1920.
PATRICK J. LYNCH,
Clerk.

48 *Clerk's Certificate.*

STATE OF INDIANA,
County of Gibson, ss:

I, Harlen L. Kays, Clerk of the Gibson Circuit Court within and for said County and State, do hereby certify that the above and foregoing transcript contains, full, true and correct copies of all

papers and entries in said cause required by the above and foregoing præcipe.

Witness my hand and the seal of said court at Princeton, Indiana, this the 26th day of November, 1920.

[SEAL.] HARLEN L. KAYS,
Clerk Gibson Circuit Court.

Filed Dec. 6, 1920.
PATRICK J. LYNCH,
Clerk.

49 In the Supreme Court of Indiana, November Term, 1920.

SOUTHERN RAILWAY COMPANY, Appellant,

v.

JOSEPH H. CLIFT, Appellee.

Assignment of Error.

The Appellant says that there is manifest error in the judgment and proceedings in this cause in this, to-wit;

1. That the court erred in overruling the demurrer to the third paragraph of the amended complaint.

For which said error the Appellant prays that the judgment be in all things reversed.

(Signed) LUCIUS C. EMBREE,
MORTON C. EMBREE,
Attorneys for Appellant.

And the Appellee says that there is no error in the record.

——— ———,
——— ———,
Attorneys for Appellee.

Filed Dec. 6, 1920.
PATRICK J. LYNCH,
Clerk.

50 And afterwards, to-wit: on the 5th day of January, 1921, the same being the 39th Judicial Day of the November Term, 1920, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties by their counsel, and this cause is submitted to the Court for judgment and decree as provided by the Act of the General Assembly of the State of Indiana, approved April 13, 1885, and the rules of said Court adopted in relation thereto.

And afterwards, to-wit: on the 4th day of March, 1921, the same being the 89th Judicial Day of the November Term, 1920, of said court, the following further pleas and proceedings were had herein;

Comes now the Appellant by counsel and files a petition herein for additional time in which to file brief for Appellant, in the words and figures following; (H. I.).

And afterwards, to-wit: on the same day the Court being sufficiently advised in the premises, grants Appellant's petition here for additional time and said time is granted to and including April 4, 1921.

51 And afterwards, to-wit: on the 26th day of March, 1921, the same being the 108th Judicial Day of the November Term 1920 of said Court, the following further pleas and proceedings were had herein:

Comes now the Appellant by counsel, and files its brief herein in the words and figures following: (H. I.).

And afterwards, to-wit: on the 16th day of April, 1921, the same being the 126th Judicial Day of the November Term 1920 of said Court, the following further pleas and proceedings were had herein:

Comes now the Appellee by counsel and files its motion to dismiss the appeal herein with its brief thereon, in the words and figures following: (H. I.).

And afterwards, to-wit: on the 25th day of April, 1921, the same being the 133rd Judicial Day of the November Term 1920 of said Court, the following further pleas and proceedings were had herein:

Comes now the Appellant by counsel and files a petition herein for additional time in which to file brief for Appellant in resistance to Appellee's motion to dismiss the appeal, in the words and figures following: (H. I.).

And afterwards, to-wit: on the same day the Court being sufficiently advised in the premises, grants Appellant's petition here for additional time and said time is granted to and including May 16, 1921.

52 And afterwards, to-wit: on the 29th day of April, 1921, the same being the 137th Judicial Day of the November Term 1920 of said Court, the following further pleas and proceedings were had herein:

Comes now the Appellant by counsel, and files -is brief on Appellee's motion to dismiss the appeal, in the words and figures following: (H. I.).

And afterwards, to-wit: on the 13th day of May, 1921, the same being the 149th Judicial Day of the November Term 1920 of said Court, the following further pleas and proceedings were had herein:

Comes now the parties by counsel, and the Court being advised in the premises, overrules appellee's motion to dismiss the appeal heretofore filed, orders cause advanced, and affirms the judgment of the court below with the following opinion pronounced Per Curiam. (H. I.).

THE STATE OF INDIANA:

In the Supreme Court, November Term, 1920, on the 13th Day of May, ~~1920~~, Being the 149th Judicial Day of said November Term, 1920. 1921

Hon. Benjamin M. Willoughby, C. J.;
Hon. Howard L. Townsend,
Hon. Louis B. Ewbank,
Hon. David A. Myers,
Hon. Julius C. Travis,
Associated Justices.

53 In the Case of

No. 23876.

SOUTHERN RAILWAY COMPANY

vs.

JOSEPH H. CLIFT.

Appealed from the Gibson Circuit Court.

This is the second appeal of this case. On the former appeal this court decided that Acts 1911, Ch. 183, p. 454 (Burns 1914, §3920*b*-3920*h*) was not in contravention of the Constitution of the United States, at least so far as the initial carrier was concerned, and that the third paragraph of the complaint stated facts sufficient to constitute a cause of action. And the cause was remanded to the trial court with a mandate which amounted to an express direction to overrule appellant's demurrer for alleged want of facts to said paragraph.

Clift v. Southern R. Co. 188 Ind. 472, 124 N. E. 457.

The trial court obeyed the mandate, and appellant refused to plead over, and suffered final judgment on its demurrer, from which this appeal was taken. And the only question presented by the appeal is the sufficiency of the said third paragraph of the complaint to withstand a demurrer for the same cause as before.

Upon that question the decision on the first appeal is the law of the case.

Cleveland, etc. R. Co. v. Bling, 186 Ind. 628, 629, 117 N. E. 641.

Appellee's motion to dismiss the appeal having required us to examine this case, and it appearing to be one entitled to advancement, as involving a constitutional question, and one of public interest, we deem it best to dispose of the whole matter at this time. The motion to dismiss the appeal is overruled, and the cause is now ad-
54 vanced for immediate consideration and decision.

The judgment is affirmed.

It is therefore considered by the Court that the judgment of the court below in the above entitled cause be in all things affirmed at the cost of the appellant.

And it is further considered and adjudged by the Court that the appellee recover of the appellant the sum of $— for his costs in this behalf expended.

And afterwards, to-wit: On the 31st day of May, 1921, the same being the 8th Judicial Day of the May Term, 1921, of said Supreme Court, the following pleas and proceedings were had herein:

Comes now the Appellant by counsel, and filed in the office of the Clerk of the Supreme Court, its petition for the allowance of a writ of error, said petition and the allowance thereof by Hon. Howard L. Townsend, Chief Justice of the Supreme Court of the State of Indiana, being hereto next below attached, and being as follows:

In the Supreme Court of Indiana.

No. 23876.

SOUTHERN RAILWAY COMPANY, Appellant,

vs.

JOSEPH H. CLIFT, Appellee.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of the State of Indiana in rendering judgment against it in the above entitled case, the Southern Railway Company, Appellant, hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

55 (Signed) JOHN D. WELMAN,
Attorney for Appellant.

STATE OF INDIANA, *ss:*

Supreme Court of Indiana.

Let the Writ of Error issue upon the execution of a bond by the Southern Railway Company to Joseph H. Clift in the sum of $500.00; such bond when approved to act as a supersedeas.

Dated May 31st, 1921.

(Signed) HOWARD L. TOWNSEND,
Chief Justice Supreme Court of Indiana.

(Endorsed:) Filed May 31, 1921. Patrick J. Lynch, Clerk.

And on the same day, the following further pleas and proceedings were had in said Court in said cause:

Comes now the Appellant by counsel, and files an Assignment of Errors in the Supreme Court of the United States, on the writ of error herein, said assignment of errors being hereto next below attached, and being as follows:

Supreme Court of the United States.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

JOSEPH H. CLIFT, Defendant in Error.

56 *Assignment of Error-.*

The Plaintiff in Error, the Southern Railway Company, assigns the following errors as having been committed herein:

1. The court erred in failing to hold that the Act of the Legislature of Indiana, being Chapter 183 of the Acts of 1911, approved March 4, 1911, and the same being Sections 3920-*b* to 3920-*h* Burns Revised Statutes of Indiana 1914; was contrary to the Constitution of the United States and particularly in violation of the Fourteenth Amendment to the Constitution of the United States, and Section One of that Amendment.

2. The court erred in holding that under said Statute of the State of Indiana that the Southern Railway Company was justly denied the right to have tried by the court, and a jury if it should demand it, the amount that the shipment of Joseph H. Clift was damaged, if any; and that the claim of Joseph H. Clift for $62.30 having been presented by him in writing for said amount stood admitted as a liability due and payable for that full amount and for the reason that the Southern Railway Company had not rejected said claim within ninety (90) days from the date of presentation and had neither paid nor rejected said claim in whole or in part within said ninety days.

3. The court erred in rendering and affirming judgment against the Plaintiff in Error for the full amount of said claim together with interest upon the pleadings in said cause, thereby denying the Plaintiff in Error the right to defend the case upon its merits as to the amount the Defendant in Error was damaged and whether he was damaged at all.

4. The court erred generally in its decision against the Plaintiff in Error.

Wherefore, for these and other manifest errors appearing in the record, the said Southern Railway Company, Plaintiff in Error prays that the judgment of the said Supreme Court of Indiana be
57 reversed and set aside and held for naught, and that judgment be rendered for the Plaintiff in Error granting it its rights

under the Constitution of the United States, and plaintiff in error also prays judgment for its costs.

(Signed) ALEXANDER P. HUMPHREY,
EDWARD P. HUMPHREY,
JOHN D. WELMAN,
LUCIUS C. EMBREE,
Attorneys for Plaintiff in Error

(Endorsed:) Filed May 31, 1921. Patrick J. Lynch, Clerk.

And on the same day the following further pleas and proceedings were had in said Court, in said cause.

Comes now the Appellant by counsel, and files its bond on appeal to the Supreme Court of the United States, in the penal sum of five hundred ($500.00) dollars, with the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, which bond is taken and approved, a copy being hereto next below attached, and being as follows:

In the Supreme Court of Indiana.

No. 23876.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

JOSEPH H. CLIFT, Defendant in Error.

58 Know all men by these presents, That we, Southern Railway Company, as principal, and the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto Joseph H. Clift in the sum of Five Hundred dollars ($500.00) for payment of which well and truly to be made, we, the Southern Railway Company, principal, and the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, bind ourselves jointly and severally by these presents.

The condition of this obligation is such that whereas the said Joseph H. Clift instituted a certain action against the Southern Railway Company in the Gibson Circuit Court demanding the sum of Sixty-two and 30/100 Dollars ($62.30), and all other and proper relief, and judgment was rendered in said Gibson Circuit Court against the Southern Railway Company in the sum of One Hundred Five and 15/100 ($105.15), and subsequently an appeal was taken from said judgment to the Supreme Court of Indiana and was affirmed on the 13th day of May, 1921; and whereas the Southern Railway Company has sued out a writ of error from the Supreme Court of the United States to reverse said judgment of the Supreme Court of Indiana.

Now, therefore, if the above bounden Southern Railway Company shall prosecute said writ of error to effect and pay the judgment and

costs, if it fail to make good this appeal, then this obligation shall be void, otherwise in full force and effect.

Witness our hands and seals this the 31st day of May, 1921.

SOUTHERN RAILWAY COMPANY,
By JOHN D. WELMAN,
Attorney-in-Fact.
UNITED STATES FIDELITY & GUARANTY COMPANY,
By N. D. SMITH, [SEAL.]
Attorney-in-Fact.

59 The above and foregoing bond is approved this the 31st day of May, 1921.

(Signed) HOWARD L. TOWNSEND,
Chief Justice of the Supreme Court of Indiana.

(Endorsed:) Filed May 31, 1921. Patrick J. Lynch, Clerk.

And on the same day the following further pleas and proceedings were had in said Court, in said cause:

Comes now the Appellant by counsel, and files a writ of error from the Supreme Court of the United States, to the said Supreme Court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Indiana, Greeting:

Because in the record and proceedings, as also on the rendition of the judgment of a plea which is in the said Supreme Court, before you, between Joseph H. Clift and Southern Railway Company a manifest error hath happened, to the great damage of the said Southern Railway Company as by *his* complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the Supreme Court of the United States,
60 to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Joseph McKenna, Associate Justice, next in precedence to the Chief Justice of the Supreme Court of the

United States, and the seal of said District Court, this 31st day of May, A. D. 1921.

[Seal District Court of the United States, District of Indiana.]

NOBLE C. BUTLER,
Clerk of the District Court of the United States for the District of Indiana.

5/31/21. Allowed.
HOWARD L. TOWNSEND,
Chief Justice of the Supreme Court of Indiana.

(Endorsed:) Filed May 31, 1921. Patrick J. Lynch, Clerk.

And afterwards, to-wit: on the 2nd day of June, 1921, the same being the 10th Judicial Day of the May Term, 1921, of said Supreme Court, the following pleas and proceedings were had herein:

Comes now the Appellant by counsel, and files his citation on said writ of error, duly signed by Hon. Howard L. Townsend, Chief Justice of this Court, and proof of service of the citation on the defendant in error, said citation and proof of service thereof
61 being hereto next below attached, and being as follows:

UNITED STATES OF AMERICA, *ss:*

To Joseph H. Clift, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington thirty (30) days after the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of Indiana, wherein the Southern Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there by, why the judgment rendered against the Plaintiff in Error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Howard L. Townsend, Chief Justice of the Supreme Court of Indiana this the 31 day of May, 1921.

[SEAL.]

HOWARD L. TOWNSEND,
Chief Justice of the Supreme Court of Indiana.

Citation accepted for Joseph H. Clift, Defendant in Error, this the 1st day of June, 1921.

JOSEPH H. CLIFT,
By MORTON McDONALD,
Attorney in Fact and Attorney of Record.

(Endorsed:) Filed June 2, 1921. Patrick J. Lynch, Clerk.

62 STATE OF INDIANA:

Supreme Court.

No. 23876.

SOUTHERN RAILWAY COMPANY, Appellant,

vs.

JOSEPH H. CLIFT, Appellee.

I, Patrick J. Lynch, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record of proceedings had, papers filed, motion decided, rulings made, opinions delivered, judgments rendered, and all decrees and orders entered in the Supreme and Appellate Courts of Indiana in the above entitled cause No. 23876. Southern Railway Company vs. Joseph H. Clift, appealed from the Gibson Circuit Court, with all things concerning the same also the original petition for the allowance of the writ of error, and the allowance thereof; the original writ of error, and the allowance thereof; the original writ of error from the Supreme Court of the United States to the Supreme Court of Indiana, with allowance thereof; the original citation to the defendant in error and proof of service thereof; and its approval by the Chief Justice of the Supreme Court of Indiana; and the original assignment of errors in the Supreme Court of the United States, as appears from the papers on file in my office.

Which said transcript, annexed hereto, together with said original petition for the allowance of a writ of error, said original writ of error, original citation, copy of original bond and original assignment of errors, I certify as and for my full return to said writ of error.

63 In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Indianapolis, Indiana, this the 10th day of June, 1921.

[Seal of Supreme Court, State of Indiana.]

PATRICK J. LYNCH,
Clerk Supreme Court of Indiana.

Endorsed on cover: File No. 28338. Indiana Supreme Court. Term No. 383. Southern Railway Company, plaintiff in error, vs. Joseph H. Clift. Filed June 29th, 1921. File No. 28338.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1922

No. [redacted] 107

SOUTHERN RAILWAY COMPANY, - Plaintiff in Error,

versus

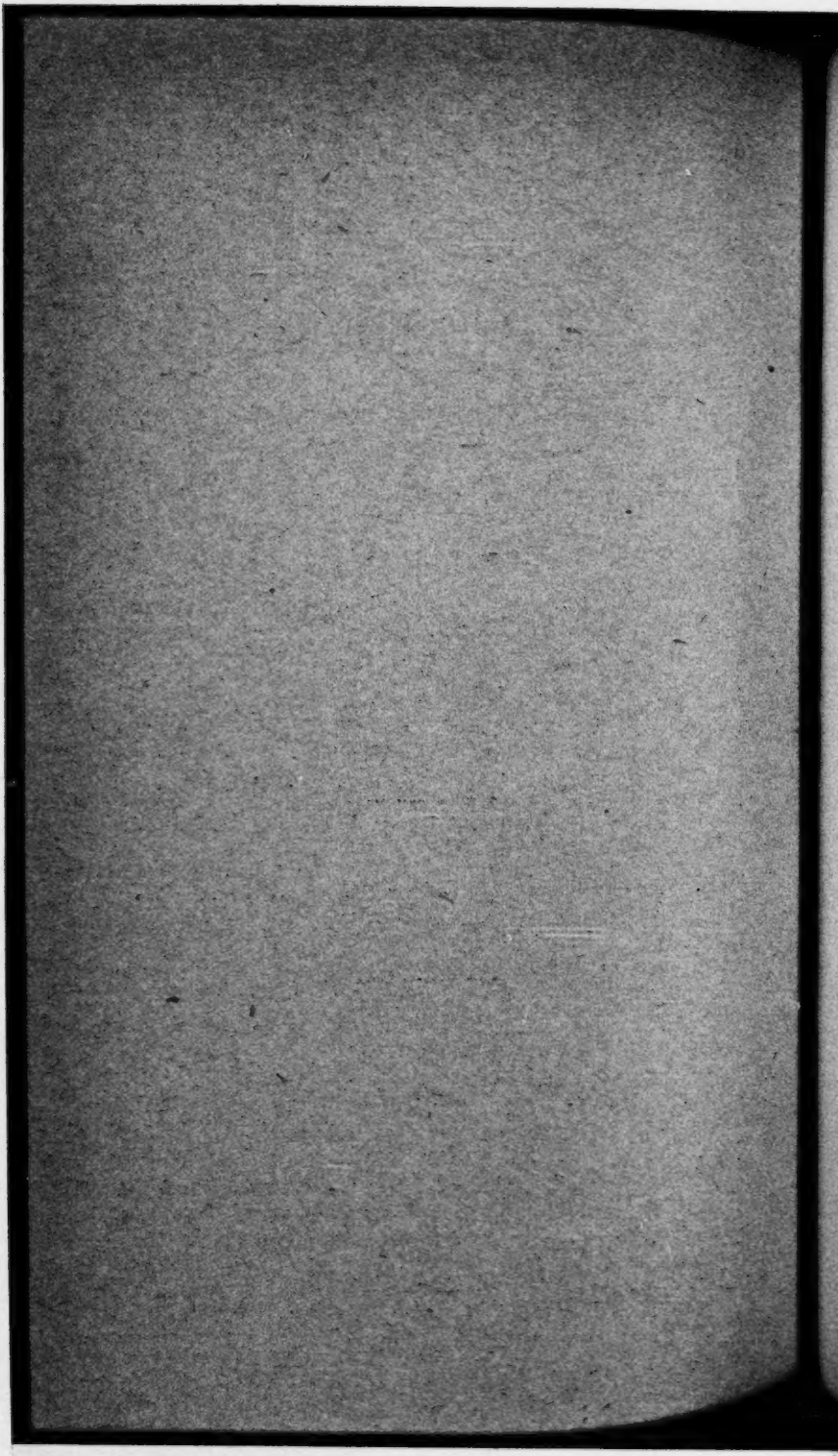
JOSEPH H. CLIFT, - - - Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN D. WELMAN,
ALEXANDER POPE HUMPHREY,
Counsel for Plaintiff in Error.

L. E. JEFFRIES,
EDWARD P. HUMPHREY,
James C. Embree *Of Counsel.*

Waterfield-Bonte Co., Incorporated, Louisville, Ky.



SUBJECT INDEX.

TABLE OF CASES.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 383.

SOUTHERN RAILWAY COMPANY, - *Plaintiff in Error,*

vs.

JOSEPH H. CLIFT, - - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

The parties to this suit will be called the Railway Company, on the one hand, and Clift, on the other.

STATEMENT OF CASE.

A shipment of watermelons was delivered to the Railway Company at a station on its line in the State of Indiana, to be carried by the Railway Company to New Albany, Indiana, and thence carried by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company to destination at Marion, Indiana.

The storm center of this controversy is the constitutionality of a certain clause in an Act passed by the Legislature of the State of Indiana. This Act is printed in full in the Appendix. It is Chapter 183 of the Acts of the General Assembly of the State of

Indiana for the year 1911 (Acts 1911, p. 454; Burns, 1914, Sections 3920b to 3920h). The particular clause is at the beginning of Section 3 of this Act, and reads as follows:

> "That every claim for loss of or damage to freight transported wholly between points within the State of Indiana may be presented to the agent of the carrier who issued the receipt or bill of lading therefor or to the freight agent or representative of such carrier at the point of destination, or to any freight agent of any carrier in whose possession such freight was when lost or damaged, and when so presented shall be paid or rejected by such carrier within ninety days therefrom, and if neither paid nor rejected in whole or in part within such time, such claim shall stand admitted as a liability due and payable to the full amount thereof against any such carrier, and may be recovered in any court having competent jurisdiction."

By Section 3920g of the said Act the claimant is required to present his demand within four months.

Clift brought suit in the Gibson (Indiana) Circuit Court against the Railway Company, setting forth his cause of action in amended complaint in two paragraphs. (R. 5.) A general demurrer was sustained to each of these paragraphs. Thereupon Clift filed a third paragraph of amended complaint (R. 14). A demurrer was sustained to this paragraph. Thereupon Clift prosecuted an appeal to the Supreme Court of Indiana, where the judgment was reversed. We believe there is no clearer way of bringing before this court the matter presented for its decision

than to copy in full the decision of the Supreme Court of Indiana (R. 23), as follows:

"State of Indiana:

"In the Supreme Court, May Term, 1919, on the 17th day of October, 1919, being the 125th Judicial Day of the May Term, 1919.

In the Case of

No. 23170.

Joseph H. Clift

vs.

Southern Railway Company.

Appealed from the Gibson Circuit Court.

Opinion.

"Come the parties by their attorneys, and the court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Harvey, J.:

"Cause transferred to this court for want of jurisdiction in the Appellate Court.

"This is an action to recover of appellee the amount of a claim for lost and damaged freight, which claim is alleged to have been admitted by appellee to be owing appellant because the claim was neither 'paid or rejected by such carrier within ninety days' of its presentation.

"This cause of action is based upon the provisions of the Act of March 4, 1911 (Burns, 1914), and is not an action to enforce any common law remedy against the Railroad Company for damage to or failure to deliver freight.

"The rights and remedies of the parties depend, in this action, upon the validity of said Act, the facts relating to the filing of said claim and the conduct of appellee in reference to the claim filed.

"The third paragraph, and the only paragraph of complaint then before the court was held insufficient upon demurrer for want of facts, and judgment was rendered upon plaintiff's failure to plead further. The only question here is as to whether the court's ruling upon demurrer was erroneous.

"The Act is, so far at least as the initial carrier is concerned, not in contravention of the Constitution of the United States. For reasons see: Seaboard Air Line Railway v. Seegers Bros., 52nd Law Ed. U. S., p. 110; Kansas City Southern Railway Co. v. Anderson, 233 U. S., p. 325.

"For the same reasons it is not in contravention of the Constitution of the State of Indiana.

"The claim so filed states that Griffin & Tichenor, as agents for appellant, delivered to appellee nine hundred and twenty-three watermelons of the value of sixty-two dollars, for transportation to Marion, Indiana, there to be delivered to Carr & Company, upon presentation of the bill of lading; that said melons were at the time of delivery to appellee in good and merchantable condition.

"That at Marion the carrier wrongfully, in violation of the terms of the bill of lading, allowed Carr & Company to enter the car and inspect the melons and remove a portion thereof without a surrender of the bill of lading. That appellee failed to notify appellant of the refusal of Carr & Company to accept said melons, and failed to take any steps to dispose of said melons, or to protect the interests of appellant. That said melons were so held at Marion until the same became spoiled and wholly useless to claimants.

"To this claim was attached the original bill of lading, which shows that the property was received at Princeton, Indiana, 'from Griffin &

Tichenor, and consigned to the order of Griffin & Tichenor, destination Marion, Indiana, notify Carr & Company,' and said bill was signed 'Griffin & Tichenor, shippers.'

"The complaint alleges that within four months from date of said shipment, and after the arrival of said shipment at the city of Marion, plaintiff presented to the agent of the defendant, who issued the bill of lading, at said city of Princeton, his claim in writing for loss of and damage to said melons, which claim was itemized and verified by one Moses C. Griffen, as agent for the plaintiff, and that to said claim was attached the original paid freight bill received on account of said shipment; and that the defendant, appellee, did not at any time within ninety days from the time said claim was so presented, nor did any one in its behalf, either pay or reject said claim, in whole or in part.

"Appellee claims that said complaint fails to allege a number of things which appellee believes to be material, the absence of which renders said complaint insufficient. For instance, that there is no allegation that the 'order bill of lading' was endorsed, nor does there appear upon the copy of the bill of lading attached to the alleged claim any writing purporting to be an endorsement thereof; that there is no allegation that Carr & Company ever had the bill of lading in their possession; that there is no allegation of fact whereby it appears that the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company could have delivered the melons to Carr & Company without breaching the contract as same is evidenced by the bill of lading; that the claim itself set out in the complaint shows upon its face that appellant did not present a claim to the agent of appellee; but that the same was presented by other parties; that the bill of lading was not issued to appellant, but to the order of

Griffen & Tichenor. That there is no allegation that appellee, Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company ever had any knowledge or notice that appellant was the owner of any part of the melons, or had any interest in them; there is no allegation that Griffen & Tichenor were not notified by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company of the alleged refusal of Carr & Company to accept the melons; that there is no allegation that appellant did not have knowledge of the refusal of Carr & Company, nor that his alleged agent did not have such knowledge within a reasonable time after such refusal; that the facts pleaded disclose that appellant was not the lawful holder of said bill of lading.

"From the complaint it sufficiently appears that the claim was properly filed for and on behalf of appellant by appellant's agents, and that if appellee was liable to any one, it was liable to appellant, rather than Griffen & Tichenor, and that the appellant was the lawful holder of the bill of lading, although the same may have been in the possession of Griffen & Tichenor, his agents.

"The claim filed discloses appellant's interest, and if appellee had doubt on this question, it could easily have protected itself by rejecting the claim.

"Allegations as to the conduct of the railroad companies, or their failure to act in reference to the preservation of the melons, notice, etc., would be essential to a good complaint in a common law action for damages; but they are not essential to a complaint which seeks to recover because the defendant did not within the time limited pay or reject said claim, in whole or in part.

"The complaint shows that appellant is one of the class of persons entitled to recover under

this statute. It is disclosed by the complaint, and admitted by demurrer, that the plaintiff was the owner of the melons for which he filed the claim; and it is admitted that said melons were shipped by appellant through his agents. It is admitted that the same did not come to the hands of the persons to whom they were to be delivered. Enough is disclosed to show that the claim was not fictitious and that it was filed by one who had the dealings with appellee, and who, under the statute, was entitled to have his claim acted upon within ninety days, and to be informed within said time of the appellee's action upon the claim.

"No question is here presented as to whether appellant, if he desired to pursue his claim after the Railroad Company had failed to act upon the same, should have taken the same up with the Railroad Commission, or its successor, the Public Service Commission.

"The paragraph was sufficient, and the demurrer should have been overruled.

"Judgment reversed with directions for further proceedings in accord herewith."

The case then went back to the Gibson Circuit Court, and the Railway Company again presented a demurrer. (R. 27.) The Circuit Court overruled the demurrer. (R. 28.) Thereupon, the Railway Company declining to plead further, judgment was entered against it in the sum of $105.15 and costs.

The Railway Company then appealed to the Supreme Court of Indiana. Clift made a motion in that court to dismiss the appeal. This motion was overruled and the judgment below affirmed. We give the opinion of the court on this second hearing. (R. 34.)

"In the Case of

Southern Railway Company

vs.

Joseph H. Clift.

Appealed from the Gibson Circuit Court.

"This is the second appeal of this case. On the former appeal this court decided that Acts 1911, Ch. 183, p. 454 (Burns 1914, Section 3920b-3920h), was not in contravention of the Constitution of the United States, at least so far as the initial carrier was concerned, and that the third paragraph of the complaint stated facts sufficient to constitute a cause of action. And the cause was remanded to the trial court with a mandate which amounted to an express direction to overrule appellant's demurrer for alleged want of facts to said paragraph. Clift v. Southern R. Co., 188 Ind. 472, 124 N. E. 457.

"The trial court obeyed the mandate, and appellant refused to plead over, and suffered final judgment on its demurrer, from which this appeal was taken. And the only question presented by the appeal is the sufficiency of the said third paragraph of the complaint to withstand a demurrer for the same cause as before.

"Upon that question the decision on the first appeal is the law of the case.

"Cleveland, etc., R. Co. v. Bling, 186 Ind. 628, 629, 117 N. E. 641.

"Appellee's motion to dismiss the appeal having required us to examine this case, and it appearing to be one entitled to advancement, as involving a constitutional question, and one of public interest, we deem it best to dispose of the whole matter at this time. The motion to dismiss the appeal is overruled, and the cause is now advanced for immediate consideration and decision. The judgment is affirmed.

"It is therefore considered by the court that the judgment of the court below in the above entitled cause be in all things affirmed at the cost of the appellant.

"And it is further considered and adjudged by the court that the appellee recover of the appellant the sum of $———— for his costs in this behalf expended."

From this judgment a writ of error was sued out to this court (R. 38).

ASSIGNMENT OF ERRORS.

The Railway Company assigns the following errors as having been committed herein:

"1. The court erred in failing to hold that the Act of the Legislature of Indiana, being Chapter 183 of the Acts of 1911, approved March 4, 1911, and the same being Sections 3920b to 3920h, Burns Revised Statutes of Indiana, 1914, was contrary to the Constitution of the United States and particularly in violation of the Fourteenth Amendment to the Constitution of the United States, and Section One of that Amendment.

"2. The court erred in holding that under said Statute of the State of Indiana the Southern Railway Company was justly denied the right to have tried by the court, and a jury if it should demand it, the amount that the shipment of Joseph H. Clift was damaged, if any; and that the claim of Joseph H. Clift for $62.30 having been presented by him in writing for said amount stood admitted as a liability due and payable for that full amount and for the reason that the Southern Railway Company had not

rejected said claim within ninety (90) days from the date of presentation and had neither paid nor rejected said claim in whole or in part within said ninety days.

"3. The court erred in rendering and affirming judgment against the plaintiff in error for the full amount of said claim, together with interest, upon the pleadings in said cause, thereby denying the plaintiff in error the right to defend the case upon its merits as to the amount the defendant in error was damaged and whether he was damaged at all.

"4. The court erred generally in its decision against the plaintiff in error."

It will be seen from the statement of the case as made above that there is no question here as to the right of Clift to recover except upon the basis of the validity of the Indiana statute. This is apparent from the fact that demurrers were sustained to Clift's complaint, in attempting to state a right of action independent of the statute. When Clift appealed no effort was made to challenge the correctness of the decision of the Gibson Circuit Court in that respect. And, further, this is emphasized by the express statement of the Court of Appeals of Indiana, that the only matter before it was Clift's right to recover upon the basis of the statute.

The Fourteenth Amendment, it will be remembered, declares that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. So far as we know, no statute similar to this has ever been before the court.

This court has, however, had to consider many State enactments dealing with the relation of carriers and shippers, and the court has recognized that this is a relation so peculiar as to render valid a classification based upon it.

The case of Gulf C. & St. F. R. v. Ellis, 165 U. S. 150, may be taken as the first of these cases to reach this court. It was there held that it was not competent for the Legislature to single out railroads and impose upon them, in addition to the amount due, an attorney's fee, although in this Act it was expressly provided that this attorney's fee was only to be adjudged if the claimant should finally establish his claim and obtain judgment for the full amount thereof.

Mr. Justice Brewer delivered the opinion in this case, Mr. Justice Gray, Chief Justice Fuller and Mr. Justice White dissenting.

In Atchison, Topeka & Santa Fe R. R. v. Memphis, 174 U. S. 96, there was before this court the constitutionality of the following Act of the State of Kansas:

> "Section 1. Be it enacted by the Legislature of the State of Kansas: That in all actions against any railway company organized or doing business in this State, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages (which proof shall be *prima facie* evidence of negligence on the part

of said railroad): Provided, That in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

"Section 2. In all actions commenced under this Act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment." (Sess. Laws 1885, c. 155, 258.)

This Act was held constitutional and the Ellis case distinguished. Four of the judges, however, dissented.

It is to be observed of this Act that it did not lay down any rule of absolute liability upon the part of the railroad, providing as it did that certain proof should be regarded as *prima facie* evidence of negligence, and further providing that in estimating the damages the contributory negligence of the plaintiff should be taken into consideration. The court held that this was a police regulation designed to protect the property of adjacent landowners from fire set out by locomotive engines. Among other things, the court said, referring to the Ellis case:

> "And there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation."

This was said as characterizing the Kansas case as a police regulation, and distinguishing it from the Ellis case, which had no such element.

Mr. Justice Brewer also called attention to the fact that the Ellis case was based upon an interpretation of the Texas statute by the Supreme Court of Texas, that court holding:

> "It is simply a statute imposing a penalty upon railroad corporations for failure to pay certain debts."

On the contrary, the Supreme Court of Kansas had held that the purpose of the statute was protection against fire—a matter in the nature of a police regulation.

In Fidelity Mutual Life Association v. Mettler, 185 U. S. 308, there was considered a statute of the State of Texas, which provided that health and life insurance companies defaulting in payment of their policies should pay 12 per cent damages, together with reasonable attorney's fees. The court sustained this as based upon a reasonable classification. Of course, here again was a case where the recovery of increased damages and of attorney's fees was predicated upon the claimant's substantiating his whole claim, that is, a recovery upon his policy.

The next case to which we desire to call attention is Seaboard Air Line v. Seegers, 207 U. S. 77. In that case there was held valid a statute of South Carolina imposing a penalty of fifty dollars on all common carriers for failure to adjust damage claims within forty days from the time of the presentation of the demand. The Act, however, had the following

proviso: "Unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid." In holding this Act constitutional the court said that there was a sufficient basis for classification. The court further said:

> "It is not an Act imposing a penalty for the non-payment of debts. As the Supreme Court of South Carolina said in Best v. Seaboard Air Line R. R. Co., 72 S. Car. 479, 484: 'The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary.'"

In St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, there came before this court a statute of the State of Arkansas, reading as follows:

> "And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such cause, and a reasonable attorney's fee. And provided, further, that if the owner of such stock killed or wounded shall bring suit against such railroad after the thirty days have expired, and the jury trying such cause shall give

such owner a less amount of damage than he sues for, then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fees."

The owner of two horses demanded of the company damages in the sum of $500. The company refusing to pay this demand, the owner brought suit to recover his damages, alleged to be $400, and recovered a verdict. Thereupon the State court gave judgment for double that amount and for an attorney's fee of $50. The Supreme Court of Arkansas held the statute constitutional. This court held the Act as thus applied unconstitutional.

The next case is that of Yazoo & Mississippi Valley Co. v. Jackson Vinegar Co., 226 U. S. 217. A statute of Mississippi provided that a common carrier failing to settle claims should be liable to the consignee for $25 damages in each case in addition to the actual damages. It appeared that the plaintiff gave notice of its claim, placing the damages at $4.76, and upon the railway company's failure to settle within sixty days, suit was brought to recover that sum and the statutory penalty. At the trial the damages were assessed at the sum stated in the notice and judgment was given therefor, with the penalty. This Court said:

"Thus, the claim presented in advance of the suit, and which the railway company failed to settle within the time allotted, was fully sustained.

"As applied to such a case, we think the statute is not repugnant to either the due process of law or the equal protection clause of the Constitution, but, on the contrary, merely provides a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special legislative treatment. See Seaboard Air Line Railway v. Seegers, 207 U. S. 73; St. Louis, Iron Mountain & Southern Railway Co. v. Wynne, 224 U. S. 354.

"Although seemingly conceding thus much, counsel for the railway company urge that the statute is not confined to cases like the present, but equally penalizes the failure to accede to an excessive or extravagant claim; in other words, that it contemplates the assessment of the penalty in every case where the claim presented is not settled within the time allotted, regardless of whether, or how much, the recovery falls short of the amount claimed. But it is not open to the railway company to complain on that score. It has not been penalized for failing to accede to an excessive or extravagant claim, but for failing to make reasonably prompt settlement of a claim which upon due inquiry has been pronounced just in every respect. Of course, the argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the State court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now. Hatch v. Reardon, 204 U. S. 152, 160; Lee v. New Jersey, 207 U. S. 67,

70; Southern Railway Co. v. King, 217 U. S. 524, 534; Collins v. Texas, 223 U. S. 288, 295; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550. The judgment is accordingly affirmed."

The case of Chicago, M. & St. P. Ry. Co. v. Polt, 232 U. S. 165, was a case involving the constitutionality of a statute of South Dakota, the suit being for loss of property destroyed by fire communicated from locomotive engines. It appeared that the plaintiff demanded $838.20. The railroad company had offered, in writing, $500. The plaintiff got a verdict for $780. Double damages were allowed. Reversing the decision of the Supreme Court of South Dakota, this court said (p. 167):

"The defendant in error presented no argument, probably because he realized that under the recent decisions of this court the judgment could not be sustained. No doubt, the States have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair play required by the Fourteenth Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand. The case is covered by St. Louis, Iron Mountain & Southern Ry. Co. v. Wynne, 224 U. S. 354. It is not like those in which a moderate penalty is imposed for failure to satisfy a demand found to be just. Yazoo & Mississippi Valley R. R. Co. v. Jackson Vinegar Co., 226 U. S. 217."

The case of Kansas City Railway Co. v. Anderson, 233 U. S. 326, involves the same statute that the

court had under review in the case of St. Louis, Iron Mountain & Southern Railway v. Wynne. In this case, however, the plaintiff recovered the full amount demanded by him, and the court held that the statute as applied to such a case was constitutional, as coming within the cases of Seaboard Air Line v. Seegers, 207 U. S. 73, and Yazoo & M. V. R. R. Co. v. Jackson Vinegar Co., 226 U. S. 217. The court, however, referred with approval to the case of Chicago, M. & St. P. Co. v. Polt, 232 U. S. 165, where a statute of South Dakota was declared unconstitutional as applied to a case where the plaintiff got a verdict for less than he demanded, although for more than the railroad offered.

The case of Missouri, K. & T. Railway Co. v. Cade, 233 U. S. 642, involved the construction of a statute of the State of Texas imposing an attorney's fee on a defeated defendant in certain classes of cases. The instant case was a suit for wages, and the court in which the suit was brought gave judgment for the amount sued for, and an attorney's fee. This court held the statute constitutional. It is to be observed, however, that the statute as given in the note on page 646 expressly provided that the attorney's fee should only be allowed if the claimant finally established his claim and obtained judgment for the full amount thereof as presented.

The case of Missouri, K. & T. Railway Co. v. Harris, 234 U. S. 412, involved the constitutionality of a statute of the State of Texas allowing attorney's fee

in certain actions based on claims for small amounts against railroad companies. This is the same statute that this court had considered in M. K. & T. Railway Co. v. Cade, 23. U. S. 642. We have given above the terms of this statute. The question in the instant case was whether this statute could be constitutionally applied to interstate shipments. This court held that it could be so applied.

The case of Atchison, Topeka & Santa Fe Ry. Co. v. Vosburg, 238 U. S. 56, involved the constitutionality of the reciprocal demurrage law of Kansas, of 1905. The court held that the law was unconstitutional because, while imposing reciprocal demurrage burdens on both carrier and shipper, it provided that in case of delinquency on the part of the carrier the shipper might recover an attorney's fee, but in the case of delinquency on the part of the shipper it did not provide that the carrier might recover an attorney's fee, hence the court held that the carrier was denied the equal protection of the law.

We have reviewed these various cases in order to show that this court has never held that compensation other than for the amount of damage suffered can be imposed unless the plaintiff establishes the demand which he has made prior to bringing his suit. The plaintiff must establish not only, (1) his right to recover some amount, but also, (2) an amount equal to that which he had called upon the defendant to pay prior to the bringing of the suit. In other words, in each of these cases there was recognized the

right of the defendant to contest the payment not only in whole but in part, and it was held that there could be no imposition upon the defendant of double damages, penalty or attorney's fee unless the plaintiff had succeeded in a court of justice in establishing the validity of the claim made by him prior to bringing suit, and the full amount of his claim as fixed in his demand.

These statutes have never been allowed to be used to coerce the defendant into the payment of an unjust demand, nor into payment of a demand which was in part unjust. In every case this court, either because of the terms of the statute or because of its conception of what is the equal protection of the law, has refused to allow a claimant demanding a certain sum to punish the defendant for refusal to pay that certain sum unless after a fair hearing before a court of justice, it had been determined that the claim as presented should be carried into judgment.

We come, then, to consider whether the present statute can be sustained upon the reasoning of any of the cases upon the subject which have heretofore come before this court. It is to be observed that the Supreme Court of Indiana brushed aside all consideration of the justice of Clift's claim—whether in whole or in part—and held that by reason of this statute the Railway Company should pay him the full amount which he had demanded, simply because the Railway Company had not, within ninety days, sent

to him a communication which either agreed to pay a smaller sum or rejected the claim altogether.

It is obvious that Clift, at any time after he had suffered damage, could have brought a suit to recover from the Railway Company such damage, and provided he was able to show that the Railway Company had been delinquent, it would be for the court in such suit to fix the amount which he (Clift) was entitled to recover. The simple failure on the part of the Railway Company to respond to Clift's demand within ninety days (according to this statute as interpreted by the Supreme Court of Indiana), fastened upon the Railway Company the claim as a just claim, and the amount of the damage alleged by Clift to have been suffered by him, as the fixed amount of such damage. In other words, the Railway Company is prohibited, by the mere failure to say to Clift that it declined to acquiesce in his demand, from contesting either the justice of the demand or the amount of the alleged damage.

It is difficult to see how a litigant can receive the equal protection of the law when he is prohibited, simply on account of a failure to write a letter, from contesting the justice of a claim which has been presented to it, and from showing, even though the claim is just to a certain amount, it is not just to the extent claimed.

We are not here to apply a statute passed in the exercise of the police power of the State, as, for instance, for protection against fire set out by

locomotive engines, or killing of stock due to failing to fence the line of road, or to careless running of trains. We assume that in this character of case the Legislature has the right to say that the author of the injury shall not only pay the damage suffered but also, in some cases, double that damage or an attorney's fee in addition to the damage. But all of these cases are predicated upon the ability of the plaintiff to establish in a court of justice two elements: (1) That the defendant has violated some duty; (2) That the amount claimed by the plaintiff prior to bringing his suit was one which the trial court finds should have been paid.

Again, we are not here concerned with cases where the Legislature, in order to require the carrier to settle small damage claims, visits the carrier with a penalty. In such cases if it appears that there has been a demand for a sum really due, and the court, after a trial, has found that this amount was due, it may be just to say that the carrier should not have put the plaintiff to the necessity of going to law, and hence an attorney's fee or a small penalty may be imposed.

The statute at bar is like none of these. It is not a police regulation; it extends to claims of all amounts; it does not require the plaintiff to establish either the justice or the amount of his claim in a court. Upon both of these subjects, viz., the justice of the claim and the amount of the damage, the statute closes the mouth of the carrier.

Nor does this statute as construed by the Supreme Court of Indiana even require that the claim as presented should show upon its face that the carrier is liable. In other words, the claim does not have to contain statements constituting a cause of action. The learned Supreme Court of Indiana admits that if this claim had been shaped into a declaration it would have been demurrable; that is, the claim did not upon its face state a cause of action against the carrier.

It is admitted that the third paragraph of the plaintiff, which sets up this claim, would be demurrable for its failure to state a cause of action but that the statute does not require the claimant to state facts constituting a cause of action but simply a claim which upon its face is not fictitious. It is admitted that if the claim of Clift had been presented to a court and the Railway Company had suffered a default, the court could not have rendered judgment against the Railway Company upon the claim as stated. But, as explained above, the learned court states in so many words that the claim need not be sufficient in law to justify a judgment if presented to a court, but if presented by letter it is conclusive if the Railway Company fails within ninety days to decline its payment or to make some proposition of settlement.

If a claim is made against a person outside of those described in this Act, and such person does not respond to the claim, the claimant must, if he desires

to pursue the matter, go into court and allege and prove his claim. In the case of the carriers embraced within the terms of the Act, a claimant is not required to do this at all, but can condemn the carrier to the payment of a claim in an amount fixed by the claimant, without going into court either to establish the justice of the claim or the amount of it. All that has to be done in such a case is for the plaintiff to show that he has written a letter to the carrier and that the carrier has not answered it within ninety days after its receipt. We respectfully submit that this is not the equal protection of the law, and that the judgment of the Supreme Court of Indiana should be reversed.

Respectfully submitted,

JOHN D. WELMAN,
ALEXANDER POPE HUMPHREY,
Counsel for Southern Railway Company, Plaintiff in Error.

L. E. JEFFRIES,
EDWARD P. HUMPHREY,
Of Counsel.

APPENDIX.

"Chapter 183, Acts of the General Assembly of the State of Indiana for the year 1911, Acts 1911, page 454; Burns' 1914 Annotated Indiana Statutes, Sections 3920b to 3920h:

3920b. That a common carrier, railroad or transportation company issuing any receipt or bill of lading covering property received for transportation between points in the State of Indiana, shall be liable to the lawful holder of such receipt or bill of lading for any loss, damage or injury to such property caused by said carrier, railroad or transportation company, or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law other than this Act.

3920c. That the common carrier, railroad or transportation company issuing such receipt or bill of lading, shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt judgment or transcript thereof.

3920d. That every claim for loss of or damage to freight transported wholly between points within the State of Indiana may be presented to the agent of the carrier who issued the receipt or bill of lading therefor or to the freight agent or representative of such carrier at the point of destination, or to any freight agent of any carrier in whose possession such freight was when lost or damaged, and when so presented shall be paid or rejected by such carrier within ninety days therefrom, and if neither paid nor rejected in whole or in part within such time, such claim shall stand admitted as a liability due and payable to the full amount thereof against any such carrier, and may be recovered in any court having competent jurisdiction. In case of rejection, such carrier shall return all papers received from the claimant, together with a statement of the grounds for rejection, and no other or different grounds shall be thereafter stated or relied on against such claim, except such as may thereafter be discovered by such carrier, and shall in such statement make offer of settlement as it may desire to make, and which shall be paid upon written acceptance by the claimant and shall discharge such claim. Such claimant, if he desire to pursue such claim, may do so by presenting same, together with the statement of the carrier, to the railroad commission of Indiana, who shall have power to entertain such claim and notify such carrier, and to investigate such claim and to ascertain all the facts and circumstances concerning the transaction, and to make to the parties a concise statement of the respective contentions and offers of the parties and of the evidence, together with a suggestion that the claim be abandoned, or paid, and if the latter, in

what amount. Such suggestion shall be made in the same manner as notices are given by said commission in other cases and shall constitute a rebuttable presumption in any court or proceeding of the correctness or incorrectness of such claim and of the proper amount thereof. If within fifteen days after any such suggestion any carrier to which a suggestion has been made that a claim be paid has not paid the same, or any claimant to whom a suggestion has been made that he abandon such claim has not signified in writing to such carrier such abandonment, or has refused a tender of the suggested payment, the railroad commission shall, upon a showing thereof by the aggrieved party or by some one acting in his or its behalf, and on payment to said commission of the amount of any such tender, make and certify a transcript of the matters theretofore stated to the parties, and containing such suggestion, and send the same, with any such tendered sum, to the clerk of the circuit court of the county at the place of the original presentation of such claim, who shall enter and docket the same as a civil cause in said court, and issue summons therein to the carrier and to the claimant and to any other person named in said transcript as being interested in such claim, and make the same returnable fifteen days thereafter, and if the party not theretofore complying with the suggestion of the railroad commission shall not appear in said court within fifteen days after such return day to contest the said suggestion or claim he may not do so thereafter, but a note of his non-appearance shall be made by the court and a finding made according to the suggestion; but if such party appear he may contest such suggestion or claim under the rules and laws

applicable to civil cases, and such tendered sum shall be held, applied and disbursed as in other cases. In the event any defense be offered or claimed not previously brought to the attention of the claimant as being relied on by the carrier, the court shall upon informal request therefor give such time to meet the same as may be proper under the circumstances. All claims under this Act shall be in writing, itemized and verified by the person, firm or corporation entitled by this or any other act or by the common law to make a claim for any such loss or damage, or by his, their or its agent, officer or attorney, and shall briefly direct attention to the shipment in question and concisely but informally state the claim, and shall have attached thereto the bill of lading and original paid freight bill if in the possession of the claimant. The claimant shall, at any time while his claim is pending with the carrier, upon specific written request therefore, deliver to the carrier the original or a copy of any paper in his possession, and issued by any carrier, and pertaining to such shipment, and any unwarranted delay on the part of the claimant in so doing shall to the extent of such delay extend said ninety-day period.

3920e. The remedies and procedure provided in this Act shall apply to all cases of loss of or damage to freight by any carrier thereof engaged in its transportation from a point without to a point within the State of Indiana, and occurring while such freight is in the possession of such carrier within the State of Indiana, except that the claim therefor shall be in all cases where this Act is invoked, presented to the freight agent of the carrier at the point of destination, and the transcript of the Railroad Commission

shall go to the Clerk of the Circuit Court of the county within which such place lies.

3920f. In case the finding of any court or jury shall be in favor of the claimant and shall be for as great or in case of a tender a greater amount than named in such suggestion, then the court shall to the amount so found add in favor of such claimant the sum of twenty-five dollars and make the same a part of the judgment against such carrier, and in every case of judgment the costs shall follow the execution and appeal may be had as in other civil cases. In case such finding be the same or less than the amount of any such tender, then said penalty of twenty-five dollars shall be assessed against the claimant in favor of the carrier which shall have credit or judgment in such amount, with costs, and a like penalty shall be assessed when the finding is against the claimant following any suggested abandonment of claim: Provided, That no penalty whatever shall be assessed against any claimant when any defense is for the first time set up or relied upon in said court.

3920g. All claims made under this Act shall be presented originally within four months from the date of the shipment involved, but no claim shall be filed under this Act until after the arrival of the shipment or some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof.

3920h. The provisions of this Act shall be cumulative of all other rights and remedies of the parties."

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 107.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH H. CLIFT, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

THOMAS MORTON McDONALD,
Attorney for Defendant in Error.

PRINCETON, INDIANA.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 107.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH H. CLIFT, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

The defendant in error desires to make the following additions to the statement of plaintiff in error: No petition for rehearing was filed in the Supreme Court of Indiana on first appeal (R., 26). After the cause was returned to the Gibson Circuit Court, the demurrer upon which the first appeal was considered by the Supreme Court of Indiana was withdrawn (R., 26), and another demurrer filed (R., 26-28); after the rendition of the judgment involved herein, no petition for rehearing was filed in the Supreme Court of Indiana between the date of the judgment, May 13, 1921, and the

date of the certificate of the clerk of the Supreme Court of Indiana, June 10, 1921 (R., 34-40). The transcript was filed in the office of the clerk of this court June 29, 1921 (R., 40).

Point I.

This Court is Without Jurisdiction—

1. Because at the time the transcript was filed the judgment in question had not yet become a "final judgment" within section 237 of Judicial Code, as amended;

2. Because the judgment in question did not decide any "federal question."

Sections 703 and 704 of Burns' Revision of 1914 of Indiana Statutes fix the powers of the Supreme Court of that State on appeal and the finality of its judgments.

Section 703 provides:

> "The supreme court may reverse or affirm the judgment below, in whole or in part, and remand the cause to the court below, but the court shall not reverse the proceedings any further than to include the first error. If the court affirm the judgment, damages may be assessed in favor of the appellee, not exceeding ten per cent upon the judgment in money judgments, and in any other cases in the discretion of the court, and the court shall remand such cause for execution."

Section 704 reads as follows:

> "When any cause is determined in the supreme court, the clerk shall forthwith notify the clerk of the court below that it is determined and whether

reversed or affirmed, in whole or in part, or dismissed. *At any time within sixty days after such determination, either party may file a petition for a rehearing;* if not so filed, the decision and instructions of the supreme court shall be certified to the court below, unless otherwise ordered by the court."

The judgment in question was rendered by the Supreme Court of Indiana on May 13, 1921 (R., 34). That court still retained jurisdiction of the cause for sixty days for the purpose of permitting *either party to file a petition for rehearing*. That period did not expire until July 12, 1921. The transcript was certified by the clerk of the State Supreme Court on June 10, 1921 (R., 40), and was filed in this court on June 29, 1921 (R., 40). If this court acquired jurisdiction at that time, then from the 29th day of June, 1921, to the 12th day of July, 1921, both this court and the Supreme Court of Indiana had jurisdiction of this cause. Either party could have filed a petition for rehearing with the Supreme Court of Indiana at any time between June 10, 1921, and July 12, 1921. Whether such a petition was in fact filed this court does not know, since the transcript includes only such proceedings as were had in the State Supreme Court on and prior to June 10, 1921 (R., 40).

This court has held it cannot divide or share jurisdiction with State courts. The jurisdiction of the State courts must *end* before this court can acquire jurisdiction.

Andrews, admx., *v.* Virginian R. Co., 248 U. S., 272.
Chicago, etc., R. Co. *v.* Basham, 249 U. S., 164.

In the first case above, this court said:

> *"But the existence of the power, and not the consideration moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date;* * * * That this is true would seem to be demonstrated by considering that *if it were not so, a judgment of a State court, susceptible of being reviewed by this court, would, notwithstanding that duty, be open at the same time to the power of the State court to review and reverse, thus depriving each court of its power, etc."* 248 U. S., 275.

And in the latter case this court said:

> "It is only a judgment marking the conclusion *of the course* of litigation in the *courts of the State that is subjected to our review."* 249 U. S., 167.

And this is said to be true whatever be the form of finality of the judgment.

The only point actually decided by the Supreme Court of Indiana is that on a second appeal the decision of the court on the first appeal is the law of the case. This is not the decision of a "federal question" according to the case of Northern Pac. R. Co. *v.* Ellis, 144 U. S., 458. The rule would seem especially applicable where, as in this case, no rehearing was requested on the first appeal and after remanded to the trial court the demurrer on which considered on first appeal was withdrawn.

Point II.

The Act in Question Is Valid.

The defendant in error insists that the act in question is a valid and proper exercise of the power of the States to enact regulations designed to promote the public convenience and the general welfare. The delay and neglect on the part of common carriers in handling claims of shippers has become almost proverbial. The reluctance of shippers to enter into litigation with large corporations over small claims is likewise well known. Thousands of dollars are lost to shippers annually on this account. This statute was designed to provide a reasonable incentive for a prompt *consideration* and decision on just claims. The act requires:

> "All claims under this act shall be in writing, itemized, and verified by the person * * * or by his * * * agent * * * or attorney, and shall briefly direct attention to the shipment in question and concisely, but informally, state the claim, and shall have attached thereto the bill of lading and original paid freight bill, etc. * * * The claimant shall, * * * upon specific written request therefor, deliver to the carrier the original or a copy of any paper in his possession, and issued by any carrier, and pertaining to such shipment, and any unwarranted delay on the part of claimant in so doing shall, to the extent of such delay, extend said ninety-day period." (Section 3920-*d*, p. 28 of brief of plaintiff in error.)

The law does not undertake to force a settlement or payment of any claims. It only seeks to require the carrier to

act one way or the other—either pay or reject, in whole or in part—within ninety days. No matter how just the claim, no penalty is imposed for failure to pay or settle. If the carrier has any doubt as to the validity or justice of the claim, or of the rights of the claimant, a rejection fully protects it. If the carrier fails to do either, then the law makes its silence an admission of liability and estops it from denying the effect of such admission. The law operates in much the same way, and is no more drastic than the statute of limitations. No matter how just the demand, or how great, the owner must bring his action within the period prescribed by the statute of limitations or he is thereafter barred. We can see no distinction in principle in a law barring the prosecution of a cause and one barring the presentation of a defense; in a law prohibiting a party from asserting a right of action and in one prohibiting him from asserting a defense. In either case the law says: "Speak now or forever hold your peace." The one comes no nearer violating the "due process" clause of the constitution than does the other.

The bill of lading on which this shipment was made contained a clause, inserted by plaintiff in error, that "claims for loss, damage, or delay must be made in writing to the carrier * * * within four months after delivery of the property," and that "unless claims are so made the carrier shall not be liable" (R., 18). Such provisions have been held valid. Had the shipper failed to file his claim within the period fixed, could he be heard to say that he had been deprived of his property without due process of law?

The cause should be dismissed or the judgment of the Supreme Court of Indiana affirmed.

Respectfully submitted,

THOMAS MORTON McDONALD,
Attorney for Defendant in Error.

PRINCETON, INDIANA.